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No.

In the Supreme Court of the United States
October Term 1995

Samson Dubria,
Petitioner

v.

State of California,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL (Fourth Appellate District, Div. One)

Petition for Writ of Certiorari for the Petitioner

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QUESTIONS PRESENTED FOR REVIEW

1. WHEN A SUSPECT IS DUPED INTO AGREEING TO BE TAKEN BY THE POLICE TO PROSECUTION OFFICES MILES FROM HIS HOME OSTENSIBLY TO BE UPDATED ON CASE DEVELOPMENTS, AND THEN WHILE ALONE AT THE PROSECUTION OFFICE AND UNWARNED OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND SILENCE, IS CONFRONTED WITH HOSTILE AND ACCUSATORY INTERROGATION ACCUSING HIM OF MURDER AND FUTURE COURT PROCEEDINGS CONCERNING THE MATTER IN QUESTION, AND STATEMENTS ARE MADE THAT HE HAS TO "GET SOMETHING GOING FOR HIMSELF", IS IT OBJECTIVELY REASONABLE FOR THE SUSPECT TO BELIEVE HE IS FREE TO GO AT ANYTIME SO THAT NO ADMONITIONS PER MIRANDA v. ARIZONA NEED BE GIVEN?

2. DOES DUE PROCESS OF LAW REQUIRE A STATE TRIAL COURT IN A CRIMINAL CASE TO GIVE LESSER INCLUDED OFFENSE INSTRUCTIONS WHERE THERE IS SUBSTANTIAL DOUBT AS TO WHETHER THE CHARGED OFFENSE OCCURRED AND EVIDENCE WHICH WOULD SUPPORT A JURY DETERMINATION OF THE LESSER UNCHARGED OFFENSE?

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Petitioner Samson Dubria respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeals entered on July 18, 1995, with review denied in the California Supreme Court on October 19, 1995.

OPINION BELOW

The opinion of the California Court of Appeal of July 18, 1995, by the Fourth Appellate District, Division One, which affirmed petitioner's conviction for first degree murder, rape by use of drug, and administering a drug to commit a felony, is not published in the official reporter. The opinion is attached as Exhibit A. A petition for review

to the California Supreme Court was denied on October 19, 1995. Exhibit B.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. As noted, a petition for review in the California Supreme Court was denied on October 19, 1995. Exhibit B. The jurisdiction of this court is based upon 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION

The Fifth Amendment provides in part that : "... no person shall be compelled in any criminal case to be a witness against himself."

STATUTES

California Penal Code section 189 provides in part: "All murder ... which is committed in the perpetration of, or attempt to perpetrate ... rape ... is murder of the first degree; and all other kinds of murders are of the second degree."

California Penal Code section 190.2(a) provides in part that a first degree murder "special circumstance making a defendant eligible for the death penalty or life in prison without parole: [occurs when] "... (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies: ... (iii) Rape in violation of Section 261.

California Penal Code section 261(a) provides in part: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: ... (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

California Penal Code section 222 provides in part: "Every person guilty of administering to another any chloroform ... with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony."

STATEMENT OF THE CASE[1]

On August 15, 1991, petitioner, a twenty-eight-year old medical doctor, was on vacation in California with a friend, the decedent, Jennifer Klapper, age twenty. They entered a motel room in Carlsbad, California, about 11:30 p.m. and had sexual relations. At 3:07 a.m., petitioner called "911" to report that Ms. Klapper was in respiratory arrest. After CPR was administered in the motel room, she was rushed to the hospital, but it was too late. She was pronounced dead at 3:52 a.m.

[1] For purposes of Rule 14(h) of the rules of this court, the two issues raised in this petition were raised in the state trial, appellate and California Supreme Court proceedings. *See* Exhibit (Appendix C) for detailed decriptions as to each issue.

The cause of death was said to be chloroform ingestion. The theory of this murder prosecution was that petitioner used chloroform to render Ms. Klapper unconscious so that he could have sex with her and that she died as a result of her reaction to the drug. As the prosecutor told the jury in opening statement:

> Our theory is not that he intended to kill her. [¶]... And even though he didn't intend to kill her, he may not have intended to kill her, under California law, if a person is killed in the commission of rape, even if it's accidental, even if it's unintentional, that's first degree murder. RT 681.

No trace of chloroform was found on Ms. Klapper's clothes, the bedding, or anywhere else except in her body. The rape theory was central to the conviction in this case because once found, it made inevitable the murder conviction, it's degree (first), as well as the rape special circumstance which led to a life without parole sentence.

This jury convicted on evidence which amounted to little more than a suspect toxicologist's report finding traces of chloroform.[2] A key piece of evidence was a

[2] The toxicological report showed chloroform in the victim's system: 24 micrograms per milliliter in the blood, no chloroform detected in the urine, seven micrograms per gram in the liver, and 17 micrograms per milliliter in the gastric contents. According to Dr. Morris, the prosecution expert, "Actually those numbers are consistent actually with very light anesthesia." RT 951; emphasis added. Petitioner argued in his habeas corpus petition, filed contemporaneously with his direct appeal in the state court of appeal, that false scientific evidence was given the jury which the State argued to support the alleged cause of death -- (continued...)

taped "statement" of petitioner which turned out to be the investigating detective's soliloquy on why he believed petitioner guilty.

[2](...continued)
cardiac arrest through chloroform intoxication. Petitioner filed two expert affidavits which noted that the San Diego Medical Examiner's office uses chloroform in the laboratory, and that contamination occurs. RT 992. Even Dr. Shaw, the lab's director, testified at the trial, "It could be caused by a number of things, yes. Human error involved, perhaps unclean glassware, unclean pipettes." RT 1009. Added to this is the following finding submitted in the habeas corpus petition: The tissues and serum in this case were collected and stored in plastic containers. As Dr. Sanchez stated in the habeas declaration, unless demonstrably protected against permeable substances (low molecular weight solvents such as chloroform) "... the container will also allow permeable substances to enter the tissue from the outside, and the significance of any positive test for the presence of a permeable substance within the tissue would therefore have to be seriously questioned." Exhibit B to habeas, pp. 2-3. Dr. Sanchez also found unexplained evidence of contamination in the gas chromatograph-mass spectrum analysis in this case. The State did not satisfactorily answer these findings in its informal response to the habeas petition.

Further, pathologist Dr. Robert Bucklin stated in his detailed declaration, citing to his own vast experience and supported by the literature in the field, that the autopsy in this case was deficient to reliably conclude as to cause of death. Exhibit A, to petition. Dr. Bucklin also states that this case is a "highly atypical presentation for a drug inhalation fatality. Essential elements found in numerous well-documented cases of solvent inhalation are clearly missing. Dr. Jariwala did not detect any characteristic odors; neither did the paramedics nor police officers who treated her in the motel room. There were no obvious signs of exposure to a known irritant such as redness, swelling, or blistering found on the facial skin or on the mucous membranes of the nose and oral cavity. Examination of the internal organs did not reveal any evidence of tissue injury. There were no signs of edema (swelling), congestion, inflammation, or ulceration in the upper airways, lungs, esophagus, and stomach or odors." Id. at 27-28.

On April 1, 1992, the District Attorney for San Diego County filed an information charging petitioner with one count of murder in the death of Jennifer Klapper, pursuant to California Penal Code section 187, rape by administration of drugs, pursuant to California Penal Code section 261a(3), and administering an anesthetic to aid in a felony, pursuant to California Penal Code section 222. CT 1-2. Additionally, a rape murder special circumstance was alleged. **Ibid.**[3]

REASONS FOR GRANTING CERTIORARI

1. WHEN A SUSPECT IS DUPED INTO AGREEING TO BE TAKEN BY THE POLICE TO PROSECUTION OFFICES MILES FROM HIS HOME OSTENSIBLY TO BE UPDATED ON CASE DEVELOPMENTS, AND THEN WHILE ALONE AT THE PROSECUTION OFFICES IS CONFRONTED WITH HOSTILE AND ACCUSATORY INTERROGATION IN WHICH FUTURE COURT PROCEEDINGS ARE MENTIONED AND IMPLIED THREATS THAT HE HAS TO "GET SOMETHING GOING FOR HIM", IT IS OBJECTIVELY REASONABLE FOR THE SUSPECT TO BELIEVE HE WAS NOT FREE TO GO, AND ALL STATEMENTS TAKEN BEFORE A MIRANDA RIGHTS ADMONITION ARE TAKEN ILLEGALLY.

One of the two issues supporting a grant of *certiorari* in this case pertains to the introduction of tape recorded statements of the petitioner taken by law

[3] "CT" stands for Clerk's Record. "RT" stands for the references to the trial transcript.

enforcement officers who had driven petitioner from his home to a prosecutor's office. The issue turns on the **Miranda v. Arizona,** 384 U.S. 436, 448, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), definition of "custody."

The question is: Would a reasonable person, unwarned of his constitutional rights, believe himself free to leave the prosecution office after: being duped into agreeing to be taken by the police to prosecution offices miles from his home ostensibly for a "chat" in which he would be updated on case developments; then, being told while at the prosecutor's office that he took a woman's life by using chloroform; being told there was no other explanation for the death other than that he did it; being subjected to a hostile and accusatory interrogation in which he is told of his future court proceedings which would take place at which the judge and jury would not believe his claims of innocence; and being informed that he needed to "get something going for himself" because his protestations of innocence to the police were not doing that?

Petitioner submits that it is objectively reasonable for a suspect under these circumstances to believe he is ***not*** free to go, and all statements taken before a **Miranda** rights admonition are taken illegally. The state court of appeal disagreed. Exhibit A, 29.

This issue is an important one of law for the issue of "custody" has been the subject of recent opinions in this Court and the California Supreme Court. *See* **Stansbury v. California,** 511 U.S. ___, 128 L.Ed.2d 293; 114 S.Ct. 1526 (1994), reversing **People v. Stansbury,** 4 Cal.4th 1017 (1993); *see* **People v. Stansbury,** 9 Cal.4th 824,

889 P.2d 588 (1995), opinion on remand. See also **Thompson v. Keohane**, __ U.S. __, ___S.Ct. __; 1995 U.S. LEXIS 8315 (1995) (most recent case addressing the issue in the context of federal habeas corpus proceedings.)

To permit interrogations to be undertaken in the fashion described only encourages police subterfuge and encourages subversion of constitutional protections, for it was no accident that the officers in this case did not admonish petitioner of his rights. His formal arrest was merely a matter of time. The detectives had warrants to search petitioner's apartment and the hospital where he worked as a medical doctor. RT 31, 33. Petitioner was the prime suspect in the murder at the time of the interrogation. RT 38. He was going to be formally arrested, but the officers first wanted the chance of tricking him into making admissions in a coercive interrogation which was in reality a constructive arrest.

There appears to be a prevailing instruction among police departments to take a suspect's statements under circumstances of custodial interrogation even if no admonitions are given and to ignore invocations of the right to remain silent. By misusing the decision in **Harris v. New York,** 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971) (holding that **Miranda**-violative statements made to the police may be used to impeach the defendant's trial testimony), the police put themselves in a win-win situation no matter what the court's rule later. If **Miranda** is deemed violated and suppression ordered, then at least the defendant will be kept off the stand or suffer impeachment with any **Miranda**-violative statements. If the tactic

produces no suppression ruling, so much the better.[4]

Admission of petitioner's taped interrogation in this case was erroneous and prejudicial. It was filled with long proclamations of petitioner's guilt by the interrogating officers. (The Court of Appeal opinion held that trial counsel did not object *sufficiently* and/or that the tape would have been too difficult to redact of the officer's denunications of petitioner's protests of innocence.)

Petitioner was the suspect in the case when officers traveled from California to New Jersey to interrogate him and conduct searches of his apartment, car and work locker. He was going to be formally arrested. But the detective in charge, DeTar, did not make an arrest on October 23, 1991, the date of the interrogation, because informing the petitioner of his rights might well have cost him a potentially useful damning statement.

No reasonable person in petitioner's position, a medical doctor surprised by the appearance of police from California in front of his apartment in New Jersey at 7:22

[4] *See e.g,* **People v. Bey**, 21 Cal.App.4th 1623 (1993); **People v. Baker**, 220 Cal.App.3d 574, 576, 269 Cal.Rptr. 475 (1990). **Baker** is a case in which the interrogating San Diego Police Officers purposefully violated **Miranda**, and admitted he did so at the suppression hearing in order to take statements suitable for impeachment should the defendant testify. The appellate court upheld the trial court's ruling that suppression was unwarranted, but hoped that the trial court initiated "steps to prohibit the San Diego Police Department from using such procedures in the future." **Id.** at 579. *See also* **Cooper v. Dupnik**, 963 F.2d 1220, 1250 (9th Cir. *en banc* 1992) (involving an Arizona police department invoking the same unconstitutional policy of unconstitutional interrogation.)

a.m. as he is about to go to the hospital to perform his medical duties, is asked to go downtown for a "chat" where the officers would "...tell you everything that's happened and we'll get it all taken care" of (CT 75),[5] and then, after being driven miles away by the police to a prosecutor's office, assured that he is "an important witness"(CT 86), would reasonably feel free to leave the interrogation session once he is informed that:

- "Tell me why your [sic] not the one who caused her death?" CT 96.
- "If I told you someone said you were responsible for her death, what would you say?" CT 99.
- "And a, pretty much, we've determined that you are responsible for her death.... ¶ There's no question. The evidence is conclusive...." CT 100.

[6] The transcript of the initial contact with petitioner states:

DUBRIA:	Oh Mr. DeTar, hi. **I was about to go to my lecture this morning.**
DETAR:	Okay, um, we need to talk to you this morning. Do you mind coming down to a, an office here in town so we can have a chat?
DUBRIA:	Sure **can I call my, um, my a, Assistant Program Director first?**
DETAR:	No. Problem. Why don't we just call from the office? (RT 74)
DUBRIA:	Okay. **Alright...(Unintelligible) some other time because a...**
DETAR:	Well, that's empty.
DUBRIA:	**...very important meeting.**
DETAR:	Well let's, we just flew in so we thought we better... ¶ Kind of important too so... (CT 75.) [Emphasis added.]

Then the inquisitor says, "Now, we need to get something going for you." CT 101. After being taken for the ten-to-fifteen-to-twenty minute ride[6] "downtown" (RT 1901), on a ruse (a "chat"), and after then being informed that he is responsible for the death of a human being, petitioner was told that he needed to get something going for himself. What would this information tell a reasonable human being who has just been surprised by an officer's accusation that he committed an unlawful homicide? The answer should have been self-evident.

The refrain of the need to "get something going" is repeated at CT 101-102: ("So now this is the opportunity for you to come clean, for you to do something good for you to say ... [sound of sigh], guys I need to tell you something.") He is told that the facts are that "you caused her death." CT 102.

• Then, he is told "now listen to me, this is important." CT 102. You need "to get something going for you that's good instead of negative stuff..." CT 102. Then the accusation becomes explicit -- "you wanted to have sex with her and used a little too much and she died, it's an accident." CT 103.

No reasonable person would feel free to go after being tricked to come "downtown" for a chat concerning an information update, and then, once in the prosecutor's office, accused of murder and that he needed to "get something going" because the police did not believe his

[6] Detective De Tar testified at the trial, at RT 1901, that it was a fifteen-to-twenty minute ride. During a pre-trial evidentiary hearing, he said, "it seemed like a ten minute drive estimating." RT 28.

exculpatory statements. This was especially true when the officers started posing questions along the lines of "what are the judge and jury going to say?" CT 103-104, 107. Obviously, petitioner was going to be formally arrested for murder in that the officers were already positing how the judge and jury would react to his claims of innocence.

The State Court of Appeal disagreed, although it noted that the "clear tone" of the interrogation communicated to petitioner that "they believed appellant was involved in causing Jennifer's death" and "told appellant they believed he was responsible for Jennifer's death but that her death was probably an accident" and that she died from chloroform intoxication. Exhibit A, 27. The court noted that "...the communication of a suspicion by the officer may impact the custody equation insofar as it would affect a reasonable individual's assessment of his freedom of action." Exhibit A, 29.

Here, of course, the communication was not of "suspicion." It was an absolute declaration that petitioner was responsible for the victim's death by chloroforming her to have sex, and that a criminal case was forthcoming wherein a judge and jury would have to evaluate petitioner's protestations of innocence.

Common sense has not altered since 1983 when the California Supreme Court stated in a case involving the entertainer "Flip" Wilson: "Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from

the officer." **Wilson v. Superior Court,** 34 Cal.3d 777, 790, 195 Cal.Rptr. 671, 670 P.2d 325 (1983).

The State Court of Appeal asserts there was no custodial component to petitioner's interrogation because:

1) no force was used. Exhibit A, 30. No force was used because the officers, in their surprise confrontation with petitioner as he was about to leave for his work at the hospital, said they just wanted to update him on the status of the investigation and on this false premise, got his reluctant permission to take him to the prosecutor's offices miles from his home and from his work.

2) that he was told he was free to go. Exhibit A, 30. This statement came only at the *outset* of the interview. No such comments were made when the officer's true agenda unfolded and the tone of the "chat" turned into an importuning of petitioner to confess (*e.g.*, telling petitioner he was guilty of an unlawful homicide by chloroform intoxication and that there would be court proceedings to follow.)

The above two factors are the core of the lower court's ruling. Both were part of the police ruse to get petitioner from his home to the prosecutor's office to start talking.[7] They are not determinative of the custody issue

[7] **Miranda** notes the police objective in taking a suspect "downtown:" The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is privacy-being alone with the person under interrogation." The efficacy of this tactic has been explained as follows:

(continued...)

which must focus on the time when the interrogation began with the accusations of murder. No reasonable person would have felt free to leave then, and the fact that petitioner was later allowed to leave (only to be arrested a few days later) does not change the analysis of what a reasonable person would feel at the time of the interrogation and accusations of unlawful homicide. Just as a search is not justified by what it turns up, an interrogation can be custodial even if the police decide to delay the arrest until another day.

The Court of Appeal opinion placed central reliance on **Oregon v. Mathiason,** 429 U.S. 492, 50 L.Ed.2d 714, 97 S.Ct. 711 (1977). The case does not control. There, an officer *called on the phone* the defendant, a parolee, at his home and asked to meet him somewhere at the parolee's convenience. By mutual agreement over the phone, the parolee and the officer agreed to meet at a state patrol office *two blocks from the parolee's home.* (This fact alone distinguishes the case from the instant one since petitioner was deprived of his freedom in a very

[7](...continued)

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." (Miranda at 449-450.) [Footnote omitted.]

obvious way. He had been whisked away by car from his apartment when the officers surprised him in the parking lot on his way to work and driven downtown. He was dependant on the officers for his ability to return home.)

In **Mathiason,** when the officer met with the suspect, he stated his belief that the parolee had committed a burglary, falsely stating that some fingerprints were found at the scene. The suspect "sat for a few minutes and then said he had taken the property." All this occurred within five minutes of the meeting. After saying he had taken property, he was advised of his rights. **Id.** at 493-94.

Factually, this is a far cry from the instant case where a ruse was used to take petitioner from his planned journey to work, and then the tables were turned on him with an announcement at the prosecutor's office[6] that petitioner had committed a rape and unlawful homicide, and that he needed to get something going for himself for later review in court. The petitioner's interrogators did not respect petitioner's answers, but continually denigrated them and informed him he needed to "get something going for himself."

Although **Mathiason** stated that the *brief* questioning of the suspect in the parole office (just minutes prior to the rights advisal) did not *per se* require

[6] Present at the interrogation site was a New Jersey police officer, Sergeant Gannon, who worked for the Morris County Prosecutor's office. (RT 25.) Gannon's presence would only have heightened petitioner's belief that DeTar had arranged for his detention by New Jersey authorities.

a restraint of freedom of movement finding, the custody question still revolves around the factor-analysis of the totality of the circumstances. **Thompson v. Keohane,** *supra*, at ___, 1995 LEXIS 8315-22, n. 11. The most important considerations would include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.

Applying those factors here, custody is clear: (1) the site was in a prosecutor's office miles from petitioner's home and where he had been driven by the police; (2) the focus could not have been more clearly on petitioner as he was told he was responsible for the death of another human being; (3) the objective criteria of arrest were present in that petitioner was alone in a prosecutor's office being told he committed an unlawful homicide and that there would be future court proceedings in which he would have to "get something going for himself;" (4) the length and form of the questioning were prolonged, repetitive and accusatory. In the words of the trial court, "the questioning became very pointed and accusatory...." RT 78.

Stansbury v. California, __U.S. ___, 114 S.Ct. 1526, 1529-30 (1994), states the totality of evidence criteria are controlling. In **Stansbury,** the court said that "a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of **Miranda.** [Cite.] The same principle obtains if an officer's undisclosed assessment is that the person being questioned is not a suspect. In either instance, one cannot expect the person under interrogation to probe the officer's innermost thoughts.... [¶] **An officer's knowledge**

or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." (Emphasis added.)

Thus, Detective DeTar's lack of communication of his true purpose of the interview (communicated only after petitioner was taken "downtown" and after the interrogation began), is relevant in this way – once isolated from his familiar surroundings on the ruse of a "chat," petitioner is then informed he is responsible for a person's life (*i.e.,* he killed her using chloroform), and a hostile period of accusation ensues. A reasonable person would not feel free to leave in this situation, especially when being informed that the judge, jury, and prosecutor will not believe petitioner's protests of innocence.

Prejudice: In exploiting inconsistencies between the petitioner's statements to the police,[9] in final argument to the jury, the prosecution was able to make the thinnest of circumstantial evidence cases turn on the credibility of petitioner's denials of guilt.[10]

Further, the taped statement played to the jury and

[9] Petitioner's jury was told that inconsistent statements could be used as substantive evidence, and not just to impeach. RT 2121.

[10] Prejudice is made irrefutable by the argument in the State's brief to the Court of Appeal: "The October 23, tape recorded interview was replete with inculpatory and exculpatory admissions by petitioner which tended to prove petitioner's guilt when considered with the rest of the evidence in the case." Respondent's Brief 128. The State's own evaluation of the damning impact of the October 23rd statement makes the prejudice assessment easy. The State cannot prove beyond a reasonable doubt the impact of the admission of this unlawful evidence.

given them in transcript form, included long rhapsodies of Detective DeTar opining on petitioner's guilt.[11] This was a highly prejudicial and inflammatory means of putting before the jury otherwise inadmissible opinions and statements of the investigating officer. This material was extremely prejudicial and made admissible only because of the trial court's erroneous ruling permitting the custodial interrogation evidence to be admitted which included the following excerpts:

DETAR: And a, pretty much, **we've determined that you are responsible for her death.**
DETAR: **There's no question. The evidence is conclusive....**
DETAR: That your [sic] responsible. Okay? CT 100.
DETAR: I want you to understand something. You know what happened there and, and **I know what happened there....**
DUBRIA: Okay.
DETAR: **So now this is the opportunity for you to come clean**, for you to do something good for you to say ... [sound of sigh], [CT 101] guys I need to tell you something.
DETAR: Um, I believe and **there's no doubt in my mind.**
DUBRIA: Uh-hum.
DETAR: But a, **I have no doubt that, that you caused her death.** Okay?

[11] Petitioner's trial counsel objected to the playing of DeTar's commentary: "This goes on for another six or seven pages of Detective DeTar's kind of self-serving speech without anything, without any reply from my client. That this whole thing about the judge, saying things are preposterous, who's going to take responsibility, and I think that it's not my client's statements." RT 1180. The Court of Appeal found the objection to be inadequate and/or meritless. Exhibit A, 34-35.

DETAR: So what I'm asking this, you know, I'm not accusing you of anything. **I'm stating what I feel the facts are.**
DUBRIA: Right.
DETAR: **And the facts show that your [sic] responsible for it.** Now I'm asking you if, now listen to me, this is important. CT 102.
DETAR: And, and this is the opportunity you know, you guys, **you wanted to have sex with her and used a little too much and she died,** it's an accident. Okay, I can understand that. CT 103.
DETAR: You don't have any access to chloroform?
DUBRIA: No.
DETAR: So all the people that I talked to that say that chloroform is all over the hospital, will say, are liars? CT 105.
DETAR: And I, I need to write down what your side of the story is, okay? I need to write down something.
Now, **I can write down that you don't know anything.** You have no clue as to why she died...
DUBRIA: Um-hum.
DETAR: **Which everybody in the world is gonna know is a lie,** or I can tell them the truth about the issues. That there was a mistake, that it was an accident....
DUBRIA: Um.
DETAR: ... that things went a little too far ... and they would believe that, okay?
DUBRIA: Um.
DETAR: **They're not gonna believe that you have no clue** as to how she died. Think about it! CT 108.
DETAR: Okay. Who else could of killed her Sam? Who else could of caused her death?
DUBRIA: I, I don't know.
DETAR: Well we, it's it's reasonable. CT 109.

DUBRIA: But detective, how do you know that chloroform came from me though?
DETAR: You were the only one with her. CT 111.
DETAR: Sam, I want you to think about what your [sic] saying. I want you to think, you gotta get something good going for you. If you tell that story, man, **there ain't nobody that's going to believe that.** CT 112.
DETAR: ...Now, I think, I really believe that you didn't want her to die that night. **I really believe that you were in a panic,** like oh, my. CT 113.
DETAR: And that's why you really started panicking. Not only because she wasn't breathing, because you realized....
DUBRIA: Um.
DETAR: My God, what caused that. Because you see, if you, you weren't listening....[¶]....
DETAR: ...that is going to cause you more grief cause I'll tell you what's gonna happen is....
DETAR: Listen to me. Listen to me.
DUBRIA: Alright.
DETAR: Either "A", that's what gonna happen, or "B" it's gonna come across like, he made a mistake. It was an accident. He didn't mean to kill her, as a matter of fact he was so distraught and upset about the fact that he did CPR, he called the paramedics, **it was a mistake, it was an accident. The jury and the judge will believe that. They're not going to believe all these lies.**
DUBRIA: It's not a lie detective. It's not. I'm telling you what comes out...
DETAR: Because it was an accident.
DUBRIA: I mean. CT 142.
DETAR: Everybody can see that.
DUBRIA: This has been the worse two months, I think, I've been depressed....

DETAR: I agree with you.
BRUNER: Of course you do feel bad for what you did Sam. CT 143.
DUBRIA: It's got to be a mistake!
BRUNER: You, you, you....
DETAR: It's not a mistake.
BRUNER: ...kind of, you gave us the story before... [¶] Where would it be? I mean, she can't kill herself and get rid of the chloroform. CT 144.

Courts have properly reversed convictions simply for the erroneous introduction of evidence of officers testifying to their belief in the guilt of a defendant. *See e.g.*, **United States v. Harber,** 53 F.3d 236 (9th Cir. 1995) (reversal required where case agent's report containing a summary of his investigation and his opinion that the suspects were guilty mistakenly given the jurors); **People v. Sergill,** 138 Cal.App.3d 34, 39-40 (1982) (reversible error for officer to testify that child victim was telling the truth); **People v. Brown,** 116 Cal.App.3d 820, 829-830 (1981) (officer's testimony that defendant acted as a runner of drugs, and thus was as guilty as a seller, was reversible error). If prejudicial on their own, these statements are even more prejudicial when the product of unconstitutionally obtained statements.

The California courts concept of "custody," as demonstrated by this case, is unrealistic and falls constitutionally short of the objective standard set by this court. As recently stated in **Thompson v. Keohane**, *supra* at ___, "the ultimate inquiry" : "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." **California v. Beheler**, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 103 S.

Ct. 3517 (1983) (per curiam) (quoting **Mathiason**, 429 U.S. at 495).

Where no formal arrest has taken place, the pertinent question is "how a reasonable man in the suspect's position would have understood his situation." **Thompson v. Keohane,** *supra.* No reasonable person in petitioner's circumstance, having been accused of murder in a prosecutor's office, would feel free to leave.

In this court's most recent pronouncement in **Thompson v. Keohane,** *supra*, the court held that Mr. Thompson's case should be remanded for reconsideration by the lower federal courts which had mistakenly applied a presumption of correctness to the state findings of non-custody. In so ruling, the majority held that the issue was to be reviewed *de novo.* The dissent held that even if *de novo* review were applied, as a matter of law there could be no finding of custody on the facts presented.

Petitioner's case is far stronger for a custody finding than Thompson's. Thompson drove himself to the location of the police interview; in petitioner's case, petitioner was taken by police (using a ruse to get "consent") miles away from his home to a prosecutor's office. Petitioner's interrogation was far more accusatory than in Thompson (although both were the prime suspects in each case). The officers in Thompson assured him that he was free to leave throughout the interview; in petitioner's case, such a statement was made at the outset of what was promised to be a chat to update petitioner on the investigation, and was not mentioned again as the conversation went from chat to vehement accusations of homicide and inevitable future court proceedings where

petitioner was told the jury would not believe his protests of innocence. This was custodial interrogation under any reasonable assessment of the facts.

There can be no doubt that the erroneous admission of the taped "statement" of petitioner and transcript requires reversal. Their admission was not harmless beyond a reasonable doubt. **Arizona v. Fulminante,** 499 U.S. 279 [113 L.Ed.2d 302, 111 S.Ct. 1246 (1991).

This court should grant review to enforce the concept of "custody" in those situations where the police attempt to avoid their duty to admonish a defendant of his constitutional rights by ruses and gamesmanship. From any objective, common sense analysis, petitioner was in custody when he was told at prosecution headquarters that he had committed a homicide and that his exculpatory statements would not be believed by the judge and jury which would eventually hear them.

2. DUE PROCESS OF LAW REQUIRES A STATE TRIAL COURT IN A CRIMINAL CASE TO GIVE LESSER INCLUDED INSTRUCTIONS WHERE THERE IS SUBSTANTIAL DOUBT AS TO WHETHER THE CHARGED OFFENSE OCCURRED AND EVIDENCE WHICH WOULD SUPPORT A JURY DETERMINATION OF THE LESSER UNCHARGED OFFENSE.

Petitioner urges the Court to accept his case to decide that due process of law may indeed require the trial courts in noncapital cases to give lesser included offense instructions where the facts presented in the case support the lesser as well as the major offense charged. Here, petitioner's jury was charged with instructions on rape, but not on requested lesser included instructions which were supported by the evidence. The rape conviction produced a disastrous falling-domino effect for petitioner in that it was the predicate for both the first degree felony-murder conviction as well as the special circumstance finding.

The failure to give lesser included instructions has been held to be a denial of federal due process of law **Vujosevic v. Rafferty,** 844 F.2d 1023, 1027 (3d Cir. 1988)(manslaughter conviction reversed and remanded based upon a holding that the trial court committed constitutional error in refusing to instruct on aggravated assault as an LIO could not be said to be harmless beyond a reasonable doubt).

However, a survey of federal cases on this issue demonstrates that there exist numerous conflicting authorities on this issue, most of which turn on the circuits' interpretations of **Beck v. Alabama**, 447 U.S. 625, 65 L.Ed.2d 392, 100 S.Ct. 2382 (1980) (holding that an LIO

in a capital case was constitutionally required under the eighth amendment).

Some circuits hold that the failure to instruct the jury with an LIO is a denial of due process only when the error amounts to a fundamental miscarriage of justice. *See, e.g.,* **Nichols v. Gagnon,** 710 F.2d 1267, 1269 (7th Cir. 1983). The Tenth Circuit appears to have endorsed this view in stating: "when the evidence so overwhelmingly supports a lesser included offense instruction that refusing to instruct ... constitutionally taints ... the process by which defendant is found guilty of the greater offense, whether or not **Beck** is extended to recognize an automatic right to a warranted lesser offense instruction." (**Trujillo v. Sullivan,** 815 F.2d 597, 603 (10th Cir. 1987).

The First Circuit states it will review cases only where the failure to give a lesser included offense instruction threatens a fundamental miscarriage of justice in "'those instances in which the 'ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" **Tata v. Carver**, 917 F.2d 670, 672 (1st Cir. 1990).

The Sixth Circuit has, from time to time, adopted a position that LIO's are and are not required by due process of law. Initially, it applied **Beck** to non-capital cases, *see* **Ferrazza v. Mintzes,** 735 F.2d 967, 968 (1984) ("The principle [in **Beck**] is not limited to capital cases and should be applied here as well"); however, the court, in a five to four en banc decision, subsequently held that **Beck** was grounded upon eighth amendment concerns and therefore that failure to give an LIO "is not an error of such character and magnitude to be cognizable in federal

habeas corpus review ...." **Bagby v. Sowders,** 894 F.2d 792, 797 (6th Cir. en banc 1990).

The Ninth Circuit held in a recent case that "there is no settled rule of law on whether **Beck** applies to non-capital cases such as the present one" (**Turner v. Marshall**, 63 F.3d 807, 819 (1995)), but concluded by saying that any finding of constitutional error would create a new rule which would not apply retroactively to the habeas petitioner under **Teague v. Lane,** 489 U.S. 288 (1989).

Here, petitioner's counsel stated his position on lesser included instructions: If the trial court determined to give any lesser included instructions (LIOs), it should give them all. RT 2086, 2087. "Mr. Bernstein [petitioner's counsel]: Both ways, all or nothing. In other words, only the charges filed or nothing, or if we're going to give lesser but includeds over our objections, then give all the lesser but includeds." RT 2090.

A. Failing to Give Lesser Included Instructions on the Key Prosecution Theory of Rape Was a Denial of Due Process of Law. Having decided to overrule petitioner's objections to any lesser included offense (LIO) instructions being given,[12] the trial court then made an erroneous and prejudicial division of which LIO's would be

[12] California law requires that lesser included instructions be given when supported by substantial evidence even without a request by the defendant. **People v. Sedeno,** 10 Cal.3d 703, 717 (1974). Such *sua sponte* instructions are required to be given the jury under even over a defendant's objection. **People v. Barton,** _ Cal.4th __, No. S031258; 1995 Cal. LEXIS 7014 (Dec. 18, 1995). *See also* Exhibit A, 47-48.

given. LIO's for intentional murder were given, but the court refused to give any LIO's for the major theory of liability, felony murder.[13]

This jury could *only* have found first degree murder through the felony murder predicate. The prosecutor did not ask for a verdict based upon an intentional homicide, but rather based upon the felony murder theory. Thus, not giving LIO's to rape was highly prejudicial since a finding on a lesser would have precluded murder liability as well as no liability on the special circumstance.

The opinion below upholds the ruling of the trial court. In doing so, it states that it was permissible to refuse assaultive LIO's to rape (such as assault with intent to commit rape) because "it would not have assisted appellant." Exhibit, 50. As a practical matter, it certainly would have "assisted" petitioner in that a conviction on that LIO would have *precluded* the draconian felony murder theory and special circumstance liability.

As a matter of evidence, the facts supporting the rape charge were extremely tenuous at best and largely based upon conjecture. Even so, the trial court found sufficient facts to give rape, as well as attempted rape, instructions. (Both theories support felony murder and the special circumstance.) Yet, when it came to other rape-LIO instructions which would *not* support felony murder, the

[13] The court instructed on rape (RT 2134), attempt (RT 2135), and attempted rape. RT 2138. The jury was told that a death, whether accidental or negligent, resulting from a rape or attempted rape, was first degree murder. RT 2127. In other words, all rape instructions given supported felony murder and the special circumstance.

court refused and did not give any of them.

Thus, the trial court rejected petitioner's request for an assault with intent to commit rape instruction. Petitioner argued there could have been two sexual events, and that intercourse initially could have been consensual and the second attempt assaultive. RT 2087-88. The court rejected it as speculative and unsupported by evidence (RT 2089), but as petitioner correctly responded at the time, "Your Honor, that's the problem with any of this." RT 2087; emphasis added.

The trial court also erroneously refused to give misdemeanor LIO's to rape (assault or battery) because they were supposedly time-barred by the statute of limitations.[14]

How the trial court could justify giving attempted rape, which is defined as a "direct but ineffectual act done toward" the commission of the offense (RT 2135), and not give the assault, battery or felony assault with intent to commit rape, as authorized in Penal Code section 220, is beyond logical justification. Further, it denied petitioner's jury the fair opportunity to assess petitioner's conduct as pinpointed by the lesser included charges.

In **People v. Smith,** 195 Cal.App.2d 735 (1961), the complaining witness testified to a completed rape. Another witness testified to the assault, but could not say intercourse was effected. The defendant objected to the

[14] This was error under the facts of this case because the filing of the information tolled any statute of limitations. **People v. Whitfield,** 19 Cal.App.4th 1652, 24 Cal. Rptr.2d 210 (1993).

giving of the assault to commit rape instruction; it was given, and he was convicted of that offense as an LIO of rape. The **Smith** case justified the LIO instruction by saying at page 738, "'... the jury may believe part of the testimony of a complaining witness and render a verdict for a lesser included offense for good reason, or no reason at all. The trier of fact has "the power, because of obvious extralegal factors or for no apparent reason, to find a defendant guilty of a lesser degree or class of crime than that shown by the evidence.' [Citation]."

The basis for giving the charged rape instructions to the jury here was weak circumstantial evidence. The trial court's finding of sufficient evidence to give an attempted rape instruction logically would also support giving an assault with intent to commit rape instruction. The State Court of Appeal disagreed. Exhibit A, 49-50.

Because the evidence in this case of what occurred in the motel was so unsettled the trial court gave LIO's of intentional murder which included theories of negligent conduct. RT 2131-32. This was evidently based on the defense alternative theory of recreational use of the drug leading to death which could have been independent of a sexual act, much less a forced one. RT 2082, 2084. As the trial court said, "some kind of a struggle" (RT 2088) could justify the alternative instructions it gave which would have to be independent of a sexual assault. The trial court said, "I'm going to give attempted rape anyway because I feel that's necessary in this case, on Count 2." RT 2090. Given the uncertainty of the facts coupled with the court giving an attempted rape instruction, there was no rational basis not to give the assault with intent to commit rape or other LIO's on these

facts. In fact, it was a fundamental denial of due process not to give such LIO instructions for rape.

To deny petitioner all lesser included instructions to the rape predicate to felony murder liability was exceedingly prejudicial. The rape was the centerpiece of tripartite liability: first, it formed the basis for murder; second, it made it first degree murder without any necessity of finding intent to kill; and third, it automatically established the basis for the draconian special circumstance which made mandatory the sentence of life without parole. This jury was not given any options in the matter.

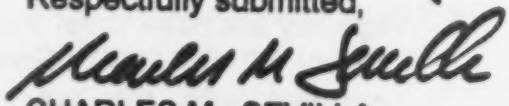
Petitioner submits that due process required the requested lesser included offense instructions on the critical rape charge. Where the facts, or more precisely, the lack of facts as to what exactly occurred in the motel room, were so clearly availing of multiple reasonable inferences, they warranted the requested lesser instructions on that charge. It was a fundamental denial of due process to fail to give such instructions and deny the jury a proper opportunity to assess the culpability of petitioner.

CONCLUSION

It is respectfully requested that the court grant *certiorari* on the two questions presented.

December 20, 1995

Respectfully submitted,



CHARLES M. SEVILLA
Attorney for Samson Dubria

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

F I L E D
Steven M. Kelly, Clerk
Jul 18, 1995
Court of Appeal Fourth District

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	D018852
	)	
SAMSON DUBRIA,	)	
	)	
Defendant and Appellant.	)	
	)(Super. Ct. No.	
	) CRN22182)	
	)	
In re SAMSON DUBRIA,	)	
	)	
on Habeas Corpus.	)	D021337
	)	

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge, and a petition for writ of habeas corpus. Judgment affirmed; petition denied.

Defendant and appellant Samson Dubria was found guilty of first degree murder with special circumstances, rape by use of drugs and administering a drug in order to assist or enable the commission of a

EXHIBIT A

felony. Sentenced to life imprisonment without the possibility of parole, he appeals, raising numerous procedural, evidentiary and instructional issues. Consolidated with this appeal is a petition for writ of habeas corpus, alleging the receipt of false scientific evidence or in the alternative the existence of newly discovered evidence. The petition also alleges ineffective assistance of counsel.

STATEMENT OF FACTS

A. Prosecution Case

1. Death of Jennifer Klapper

At approximately 3:09 a.m., on August 16, 1991, Lieutenant Joseph Hasenauer of the Carlsbad Police Department was dispatched to room 224 at the Allstar Inn in Carlsbad. The officer knocked on the door and appellant admitted him. On the bed closest to the door, Hasenauer saw Jennifer Klapper. Jennifer was not breathing and had no pulse. The officer and appellant began two-person cardiopulmonary resuscitation (CPR) with Hasenauer applying chest compressions. Hasenauer noticed no chemical odor in the room and paid no attention to Jennifer's face.

Fireman and paramedics shortly arrived. Jennifer was moved from the bed and placed on the floor. CPR and other life saving and monitoring procedures were undertaken, including the placing of an oxygen mask over her mouth and nose. None of the emergency personnel smelled a chemical odor in the room. The firemen removed Jennifer's sweatshirt but did not otherwise affect the condition of her clothing. Jennifer did not respond to treatment and was transported by

ambulance to Tri-City Hospital. At the hospital further attempts were made to resuscitate her but to no avail. The emergency room doctor could find no cause for Jennifer's death.

2. Relationship

Jennifer, who was 20 years old at the time of her death, was living at home in Cincinnati with her family and planned to attend college in the fall. From January to October 1990, Jennifer worked in the medical library at Good Samaritan Hospital in Cincinnati where she became friends with appellant, a 28-year-old resident physician.

The relationship between Jennifer and appellant was not a romantic one. She had stated she did not find appellant romantically desirable. At the time of her death Jennifer was involved in a romantic relationship with Christopher Eckes. The two had expressed their love for each other and Jennifer carried Eckes's high school ring on her key chain. Eckes and Jennifer talked of marriage. Jennifer called Eckes several times after reaching California. During the conversation, including one only hours before her death, Jennifer told Eckes she loved and missed him.

Appellant was planning to attend a class reunion in California and asked Jennifer if she wanted to go along. While Jennifer, a movie and television fan, was interested in going, she also expressed serious reservations about the trip. She discussed the trip with Eckes. Jennifer explained her relationship with appellant was merely a friendship. She told Eckes she was reluctant to go on the trip for several reasons,

including that it would mean she would be away from him.

Jennifer told a friend she was uncomfortable about going to California with appellant since she did not know what he expected. Jennifer stated she did not find appellant physically attracted and did not intend to have a physical relationship with him. Amy Klapper, Jennifer's sister, overheard a telephone conversation in which Jennifer told appellant they were just friends, she had a boyfriend and if he expected a physical relationship while on the trip she would have to cancel her plans to go.

3. Physical Findings and Cause of Death

The emergency room physician was unable to determine why an apparently healthy 20-year-old woman had suddenly died.

Several hours after her death, Jennifer's body was examined by a coroner's investigator. The investigator noticed the lycra pants Jennifer was wearing were on inside out. Jennifer was wearing jewelry, including an earring in her pierced right ear lobe but no earring in the pierced left ear lobe. The investigator noticed scratches on Jennifer's face including a half-moon scratch on her left cheek.

Amy Klapper stated it was Jennifer's habit to remove all jewelry before going to sleep. Jennifer always wore an earring in each ear lobe.

The coroner's investigator also examined room 224 at the Allstar motel. In a trash can in the room the

investigator found a beer can, a fuzzy navel club mixed drink carton and a styrofoam cup containing a yellowish liquid. None of the items had an odor except that of alcohol.

An autopsy was performed on Jennifer's body by forensic pathologist Dr. Leena Jariwala. The doctor found numerous abrasions and bruises on Jennifer's face. Pink or red abrasions were found on her upper and lower right eyelids, on her right chin, on her left cheek and on the tip of her nose. The doctor concluded because it appeared these injuries resulted in bleeding, they were inflicted before Jennifer's heart stopped beating.

It was the opinion of Jariwala and the emergency room physician who treated Jennifer that such injuries were not associated with the application of CPR. The firemen and paramedics who administered medical aid to Jennifer did not believe any of the equipment used could cause the injuries to her face nor had they seen such injuries caused by CPR. Paramedic John Feess arrived at the Allstar motel shortly after the firemen. The firemen had already begun administering aid to Jennifer. While working near her face, Feess noticed an abrasion on Jennifer's left cheek.

The autopsy also revealed a hemorrhage in Jennifer's right temporal bone. The injury was not life threatening. An examination of swabs taken from Jennifer's vagina indicated she had sexual intercourse relatively close to the time of her death. No injuries to her vagina were detected.

After completing the autopsy, Jariwala could find no cause of death. Jariwala had Jennifer's brain examined by a team of neuropathologists who found no abnormalities.

Toxicological tests were performed on body fluid samples taken from Jennifer. A small amount of alcohol was found in her liver and gastric content samples but not in her blood. Drug testing produced only one anomalous results. The tests indicated 24 micrograms of chloroform in Jennifer's blood, 7 micrograms of chloroform per gram of her liver tissue, and 17 micrograms of chloroform per milliliter of her gastric contents. No chloroform was found in the urine sample.

Based on the toxicological findings, Jariwala concluded the cause of death was chloroform intoxication.

4. Chloroform

Dr. Lucien Morris, an eminent anesthesiologist with extensive practical and experimental knowledge of chloroform, explained the history and nature of the substance. Chloroform is an extremely potent anesthetic. Now seldom used, its administration requires great skill. Even when administered by experts, use of the substance resulted in about one death per one thousand applications. One difficulty in the use of chloroform is that the margin of error between enough of the substance and too much is very small.

Death can occur from the inhalation of chloroform in several ways. One is a "relative overdose." A lethal relative overdose occurs when a relatively small amount

of chloroform is suddenly inhaled. The concentration of chloroform rises quickly, causing disruption of electrical activity in the heart. The amount of chloroform required to cause a relative overdose is very small.

Death may also result from a "frank overdose" or inhaled chloroform. A frank overdose occurs when a large amount of chloroform is inhaled. Such inhalation causes a depression of several body system, including the circulatory and respiratory systems to the extend that death may result. Death can result from chloroform inhalation when the substance interacts in the body with other substances such as adrenaline.

Morris stated it is dangerous to administer chloroform to a sleeping person. Unless such administration is skillfully done, the persons would awake, become frightened and the resulting release of adrenaline, and its interaction with the chloroform, could be life threatening.

The standard medical method for the administration of chloroform was to place one drop on a cloth over the patient's face, return in one minute and put two drops on the cloth, then return in another minute and again double the dose and so on until the desired level of anesthesia was reached. Such method avoided sudden high concentrations of chloroform. If chloroform were poured on a rag and the rag placed over someone's face, the result would be a sudden high concentration of chloroform and death could quickly occur.

Morris reviewed the medical, toxicological and

police reports in this case. He concluded that assuming chloroform was administered to Jennifer in the motel room, it was possible its smell dissipated before the arrival of the police. While chloroform has a strong odor, unlike ether, its odor does not persist.

Morris concluded Jennifer's death resulted from a relative overdose of inhaled chloroform.

5. Appellant's Statements

As Jennifer was being attended by paramedics at the Allstar motel, appellant told police Jennifer had been in bed. Appellant went to the bathroom. While in the bathroom he heard a cry or a moan and then a "thud" as if someone had fallen. Appellant return and found Jennifer on the floor. Appellant denied he or Jennifer had used drugs but stated during the evening they had a beer.

Appellant told the officer he was a doctor and Jennifer was his traveling companion. They were on their way to Tijuana. Appellant did not describe Jennifer as his lover or girlfriend and did not mention the two had sexual intercourse that night.

Later that morning at the hospital, appellant talked with other officers. Appellant repeated his rendition of the facts involving finding Jennifer on the floor of the motel room. Appellant told the officers he examined Jennifer and found no pulse. Appellant started CPR then left the room, went to the motel office and asked the clerk to call 911. Appellant ran back to the room, discovered he had locked himself out, returned to the office, got another key and returned to

the room. Appellant stated he did not know why he did not use the telephone in the motel room to call 911.

Appellant told the officers he and Jennifer had sexual intercourse that evening, that he did not love her, that they were friends.

Later in the morning, officers spoke with appellant at the Allstar motel. Appellant explained why he and Jennifer were in California. Appellant told the officers he and Jennifer had been on a taping of the Johnny Carson show the day of Jennifer's death. They had a pizza, bought some alcoholic beverage in Burbank and then drove to Carlsbad. They were going to stay at a campsite at San Elijo State Beach but arrived instead at the Allstar motel at about 11:30 p.m. There, they watched the show they had seen taped earlier in the day. Jennifer complained of dizziness and headaches. Appellant told the officers Jennifer had a history of headaches.

Appellant stated Jennifer went to sleep but tossed and turned the whole evening. Appellant awoke at about 3 a.m. and went to the bathroom. Appellant heard a "thud," then a moan. Returning to the room he saw Jennifer on the floor. Jennifer was not breathing and had no pulse. Appellant administered CPR for about five minutes. He then panicked. Instead of using the room telephone to call for help, he ran out of the room seeking help. Appellant realized he had locked himself out of the room, ran to the motel office, got a key and asked the clerk to call 911.

Appellant stated between five and fifteen minutes

after he left the room, the paramedics arrived. Appellant stated he told the paramedics he would follow them to the hospital. Appellant stated he returned to the room to get information about reaching Jennifer's family and about five minutes later departed.

When asked if it was not longer before he arrived at the hospital, appellant stated he had given only an estimate. Appellant stated he was in a frenzy and stayed at the motel for a few minutes to catch his breath. He then looked around for his lost keys and drove to the hospital. Appellant stated he told the paramedics he would follow them to the hospital but meant he would follow later and not immediately.

Appellant admitted he and Jennifer had intercourse that night. Appellant stated he had a beer and mix drink that night and that Jennifer had several sips of the drink.

Appellant stated he did not know what had killed Jennifer, and that except for short times when she used the telephone, he and Jennifer had been together all day and all evening.

By October 1991, it had been determined Jennifer's death was the result of chloroform intoxication. On October 23, 1991. Carlsbad police detectives interviewed appellant in New Jersey. The officers talked generally with appellant about the cause of Jennifer's death. When asked if he thought Jennifer had been killed, appellant stated he had wondered about the possibility of a toxic substance in the air or in the food Jennifer had eaten.

The officers told appellant people had concluded appellant killed Jennifer. The officers told appellant they believed he wanted to have sex with her, used "a little too much and she died."

When appellant stated he did not know what the officers were talking about, they told him Jennifer had died from chloroform intoxication. Appellant asked "what do I have to do with having chloroform around?"

The officers then sketched a theory for appellant. The officers noted appellant had access to chloroform, had invited a young woman on a trip of California, a young woman who was already romantically involved with another man and who was not romantically interested in appellant. Appellant got the woman into the motel room, was the only person with her and she died from chloroform intoxication.

Appellant stated he had no knowledge of chloroform and had never used it. The officers asked appellant who else could have killed Jennifer. After admitting he was the only person with Jennifer on the ride from Los Angeles and at the motel, appellant stated maybe they ran into a truck on the freeway carrying chloroform. The officer asked why Jennifer was dead and appellant alive if that was how she was exposed to chloroform. Appellant stated he had been a little dizzy himself during the ride from Los Angeles but attributed it to lack of sleep. Appellant stated he had no explanation for the chloroform intoxication and had nothing to do with it.

The officers questioned appellant about his

relationship with Jennifer. Appellant stated the act of intercourse that evening was consensual. He explained the two arrived in San Diego about 11 or 11:30 that evening. They had a reservation at a campground but were scheduled to arrive at seven or eight o'clock. Appellant told Jennifer they were not going to make it to the campsite in time. Appellant found a motel with a low rate since the two were trying to save money. Appellant got a single room with two beds and registered as a single. Jennifer agreed with this arrangement.

6. Check-In Procedures at San Elijo State Beach

Appellant had a reservation for a campsite at the San Elijo State Beach for August 15 through 17 but records indicated he did not appear to claim the campsite.

The entrance booth at the park closes between 10:30 and 11 in the evening but the park remains open. A note is placed in the window of the booth telling latecomers which campsite has been assigned them. Nothing on the park's recorded telephone message stated the reservations of late arriving campers would not be honored.

B. Defense Case

1. Rapist Profile

Dr. Cynthia Stout, a marriage, family and child counselor, and Dr. Edward Conolley, a clinical psychologist, tested and took a history of appellant. Both believed a profile existed for the majority of rapists.

They found appellant did not fit that profile.

2. Character Evidence

Appellant offered a series of witnesses who testified to his compassion, empathy, trustworthiness and other traits of good character.

3. Medical Testimony

Dr. George Schwartz, a board certified emergency room physician, reviewed the medical and police reports as well as the testimony in the case and researched the literature concerning chloroform.

Schwartz agreed with most of the conclusions reached by the prosecution experts concerning chloroform, including that Jennifer died from an adverse reaction to the presence of chloroform in her body. Schwartz, however, believed Jennifer had ingested rather than inhaled the chloroform as had been concluded by the prosecution's expert. Schwartz's calculations, based on the autopsy report, led him to believe there was more than half a teaspoon of chloroform in Jennifer's stomach contents at the time of her death. This amount was consistent with ingestion of the substance but not inhalation.

Schwartz indicated, while still unusual, chloroform's use to produce giddiness for recreational purposes was on the rise. Chloroform was both ingested and inhaled for such purpose.

Schwartz believed the injuries to Jennifer's face were consistent with those which occur during attempts at resuscitation. The doctor disagreed with the

prosecution's expert that since the injuries had bled they necessarily occurred before death. Schwartz believed CPR could have created enough circulation to cause blood seepage into postmortem facial injuries.

Schwartz concluded given the electrical activity noted by the paramedics in Jennifer's heart, death must have occurred from five to thirty minutes before the paramedic's arrival. Schwartz believed the smell of chloroform would persist in a closed room for eight to twelve hours and would have been smelled by emergency personnel when they arrived. Oral ingestion would not have caused a great deal of vaporization. The doctor also believed that attempts at getting rid of the smell could be successful in a relatively short period of time.

4. Appellant's Testimony

Appellant testified in his own defense. He stated he met Jennifer at Good Samaritan Hospital in Cincinnati, Ohio, where Jennifer was a library assistant. The two enjoyed each other's company and would meet during their leisure time around the hospital. Eventually budget cuts were made at the hospital and Jennifer was laid off. However, the two maintained their relationship. Appellant and Jennifer went on what appellant described as seven "formal dates." They went out for dinner, played tennis and on other occasions would simply go for walks. Appellant had been attracted to Jennifer since early in their relationship and he had kissed her for the first time in April 1991.

In May 1991, after bowling, the two kissed and "cuddled" in the back seat of appellant's car.

Appellant's relationship with Jennifer was a good one and she was able to confide in him.

In March 1991, the two began discussing a trip to California. Appellant told Jennifer a special offer would allow him to purchase a round trip ticket to Los Angeles that would allow two persons to fly for $189.

In June 1991, appellant left Ohio and moved to New Jersey. Appellant and Jennifer communicated by telephone and continued discussing the California trip. Eventually the two agreed to come to California. Appellant arrived the day before Jennifer and picked her up on August 11, 1991, at the airport.

The two went to appellant's parents' house. Appellant slept on the living room couch, Jennifer slept in one of the bedrooms. Appellant and Jennifer spent several days seeing the sites.

On August 15 at 4 p.m., appellant and Jennifer watched the taping of the Johnny Carson show. The taping lasted about two and a half hours. When it was over Jennifer made a telephone call and the two departed with camping gear for the San Elijo State Beach campground. On the way they stopped for dinner and then picked up beer and a fuzzy navel mixed drink. It was 9:30 p.m. before the two left for the campground. Appellant told Jennifer they only had an hour to get to the campground. Jennifer stated they should go ahead and try to make it.

Appellant and Jennifer stopped for gas, and appellant called the campground. He was told visitors

were not accepted after 10:30 p.m. Since it was already after 10:30 and they did not know how to get to the campsite, they decided to seek other accommodations for the night. Appellant registered at the Allstar motel. The pair settled into the room at about 11:30 p.m. Jennifer turned on the television to watch the Johnny Carson show they had seen taped earlier in the day and lied on one of the two beds. Appellant walked between the beds, handed her the fuzzy navel drink and turned off the light on the night stand. Jennifer moved over on the bed, indicating appellant should lie down next to her. Appellant put his arm around Jennifer and the two began to "cuddle."

The two talked, kissed and eventually had intercourse. Before having sexual relations, appellant asked Jennifer if she was using any type of birth control method. She stated she was on the pill. After intercourse Jennifer went to the bathroom. When she returned, appellant went to the bathroom, returned and got into bed with Jennifer.

At about 3 a.m., appellant again went to the bathroom. While in the bathroom appellant heard a faint moan and then a "thud." Appellant went back into the room and found Jennifer on the floor between the bed and the wall. Appellant placed Jennifer on the bed to examine her. She was unresponsive and had no pulse. Appellant began CPR.

Appellant realized he needed help so he left the room and went to the motel office. The motel staff suggested appellant call 911 himself. Appellant ran back to the room and discovered the door had locked

behind him. He returned to the office, got a spare key, went back to the room, entered and dialed 911. In four to five minutes the police arrived. Appellant and an officer continued CPR until the paramedics arrived and took over life saving efforts.

Appellant stated he was told by the fire captain they would be taking Jennifer to Scripps Hospital in Encinitas and was given directions on how to get there. Appellant went back to the room, got his car keys and then drove to Scripps Hospital. However, he was told at the hospital that Jennifer had not been brought there. Appellant was told she might have been taken to Tri-City Hospital and was given directions to that location. Appellant went to Tri-City Hospital and found Jennifer was there and had been pronounced dead.

C. Prosecution Rebuttal

1. Character Evidence

The prosecution offered the testimony of three doctors who had worked with appellant. The doctors did not believe appellant was trustworthy and did not believe appellant had a good reputation for trustworthiness.

2. Evidence Concerning Birth Control Pills

Jennifer's gynecologist testified that in August 1991 Jennifer complained of menstrual spotting between her periods, a complaint she had also made in 1989. On August 2, 1991, the doctor, without Jennifer's request he do so, prescribed a cycle of birth control pills to treat the problem. The doctor had never before prescribed birth control pills for Jennifer. The doctor gave Jennifer two packages of pills. She was to begin

taking the pills on August 18, 1991, two days after her death.

Jennifer's belongings were turned over to her father after her death. In those belongings her father found a single packet of birth control pills with none of the pills missing.

3. Rapist Profile.

Forensic psychiatrist Dr. Melvin Goldzband testified there was no such thing as a rapist profile which can predict whether a person will commit rape.

4. Recreational Use of Chloroform

Dr. John Bushong, the emergency room doctor who treated Jennifer, stated that emergency room physicians have access to extensive and current literature on drug use. The doctor stated he had never heard of the use of chloroform for recreational purposes and had never heard of any patient at his hospital, other than Jennifer, who had died from an overdose of chloroform.

5. Chloroform

Dr. Graham Jones, a pharmacologist and toxicologist familiar with chloroform, reviewed the materials relevant to the case and concluded Schwartz was mistaken when he concluded Jennifer had ingested rather than inhaled the chloroform found her system. Jones demonstrated mathematically that Schwartz was mistaken when he concluded there was from a half to one teaspoon of chloroform in Jennifer's gastric contents at the time of her death. The actual amount of chloroform present was actually about one thousand

part of one teaspoon. Jones noted the error might have resulted from Schwartz's misreading the abbreviation "MCG" (micrograms) used in reporting the amount of chloroform in the sample. If Schwartz mistakenly read the abbreviation as "MG" (milligrams), his calculations of the amount of chloroform in the sample would be 1,000 times greater than was actually present.

Jones concluded based on several factors that Jennifer did not ingest chloroform. He further concluded that the amount of chloroform found in Jennifer's body fluids was consistent with those of a person who died from a fairly quick inhalation of a fairly high concentration of chloroform.

Jones stated the length of time the odor of chloroform would linger in a room was dependent on a host of variables. It was certainly possible for the odor to dissipate in a half hour to an hour.

D. Defense Surrebuttal

Schwartz agreed he had made an error concerning the amount of chloroform in Jennifer's gastric contents. Schwartz still believed it was possible Jennifer had ingested rather than inhaled chloroform. Schwartz believed other causes of death were possible, including aspiration. He noted aspirated material was found in Jennifer's lungs.

The defense recalled one of its psychological experts who stated an individual who would commit the crimes in this case would have signs of mental disturbance that would have been detected in testing. The expert reiterated appellant did not fit the

psychological profile of a rapist.

E. Prosecution Surrebuttal

Forensic pathologist Jariwala testified Jennifer did not die from aspiration. Aspiration is often seen in deaths arising from many causes and is a result of the dying body's inability to control its functioning. Jariwala again discounted all possible causes of death except chloroform intoxication.

The second pack of birth control pills given to Jennifer by Dr. Chung was found in a cabinet in the bathroom used by Jennifer at her home.

DISCUSSION

I

Appeal

A. Sufficiency of Evidence

Appellant argues there was insufficient evidence to support a verdict of guilt on both the first degree murder charge and on the ancillary offenses.

In addressing a claim of insufficient evidence, we review the entire record in the light most favorable to the judgment and presume in support of the judgment the existence of every fact the jury could deduce from the evidence. The test is simply whether a reasonable trier of fact could, based on the evidence presented and the inference it allows, find appellant guilty of the charged offenses. (Jackson v. Virginia (1979) 443 U.S. 307, 309; People v. Johnson (1980) 26 Cal.3d 557, 576.)

The evidence amply supports the conclusion

Jennifer died from the inhalation of chloroform. A complete autopsy, conducted by a highly qualified forensic pathologist, and a full toxicological screen revealed no possible cause of death except an adverse reaction to chloroform. Two experts on chloroform reviewed the circumstances of Jennifer's death and the medical and toxicological materials in the case and concluded death was caused by inhalation of the substance. One expert stated death would come in from one to ten minutes of the chloroform being inhaled. The chloroform levels in Jennifer's various body fluids were consistent with someone dying quickly from inhaling a fairly high concentration of chloroform.

While there was a suggestion by the defense the presence of chloroform in Jennifer's body fluids was the result of post-mortem contamination of the samples, the possibility was rejected by prosecution experts.

Rejecting the possibility of contamination, the presence of chloroform by any method other than its administration by appellant becomes difficult to accept. Appellant and Jennifer were together the whole day. When could Jennifer have inhaled the chloroform without appellant knowing she had done so or at least being aware of its effects on her? If the chloroform was ambient, why did it not affect appellant? If Jennifer were using it on her own, why was there no evidence of its presence in the room or in her effects? The only reasonable explanation is that appellant administered it to Jennifer and then, when she suffered an unexpected and fatal reaction, allowed the odor to dissipate and disposed of the substance before the police were called.

Experts stated the odor of chloroform, unlike that of ether, can disappear rapidly depending on the temperature and ventilation of a room. Although the matter is extremely hard to quantify, given the variables involved, if the level of the chloroform was diminishing, emergency personnel, given excitement and preoccupation, might not notice the odor in a relatively short time after use of the substance.

Appellant argues that given the expert testimony concerning the cessation of heart electrical activity after the heart ceases to beat and the electrical activity noted in Jennifer's heart the morning of her death, appellant would not have had time to do all he had to do, e.g., rape Jennifer, dissipate the odor of chloroform, etc., between Jennifer's heart stopping and the arrival of the police.

Although the testimony was less than clear and consistent, the medical experts agreed once no electrical activity is detected in the heart, that is, once the heart becomes asystolic, only a finite time exists before such electrical activity cannot reoccur. The experts disagreed, however, on the length of this period. The defense cardiologist stated that within five to fifteen minutes after the heart becomes asystolic, there can be no further electrical activity in the heart. The defense emergency room specialist stated electrical activity can return after as long as 20 minutes without such activity, and the emergency room physician who treated Jennifer stated the electrical activity can return after as long as 50 minutes without detectable electrical activity.

The first police officer arrived at the motel room at

3:09 a.m. At that time Jennifer had no pulse. Appellant reported Jennifer had no pulse when he first examined her at approximately 3:01 a.m. When the paramedics first electronically monitored Jennifer's heart function, they found she was asystolic, i.e., her heart showed no electrical activity. By approximately 3:20 a.m., the paramedics had treated Jennifer with drugs and had monitored electrical activity, but not a normal beat, in her heart. At the hospital the doctor noted electrical activity, again not a normal beat, in Jennifer's heart as late as 3:50 a.m.

As we read this testimony, Jennifer's heart had to have become asystolic, i.e., ceased to have any electrical activity, between five and fifteen minutes before the paramedics first monitored her heart at approximately 3:20 a.m. Given the general lack of precision in every facet of the timing of the chemical and medical events in this case, it was not impossible for appellant to have administered chloroform, raped Jennifer and then disposed of the evidence before the arrival of the emergency personnel.

Appellant also argues the evidence is insufficient to support a finding he administered chloroform to Jennifer in order to rape her. We disagree. As noted, the evidence reasonably allowed the conclusion appellant administered chloroform to Jennifer. The obvious question is why. While there was defense evidence that chloroform can be taken recreationally, there is no evidence in this case to suggest Jennifer inhaled the substance for that purpose. Appellant in his testimony did not suggest that possibility.

Jennifer's treating physician in the emergency room who, for obvious professional reasons, was well informed concerning recreational drug use and literature on such use had never seen a case of chloroform intoxication and testified the constantly updated emergency room literature did not mention chloroform as a recreational substance. The jury could reasonably conclude Jennifer did not inhale chloroform for a recreational purpose.

The autopsy revealed Jennifer had sexual intercourse at some point near the time of her death. There was strong evidence appellant and Jennifer did not have a physical relationship and Jennifer was not romantically or physically attracted to appellant. The autopsy revealed scratches on Jennifer's face that the forensic pathologist stated would have to have been inflicted before death and which paramedics and physicians indicated were not the type of injuries caused by attempts at resuscitation. One of the paramedics testified that in administering CPR to Jennifer, he noticed an abrasion on her cheek that was consistent with the half-moon scratch visible on a post-mortem photograph of Jennifer's face. It was later determined the lycra pants Jennifer was wearing when the police arrived at the motel room were inside out.

These facts allow the reasonable conclusion appellant, a medical doctor, planned to render Jennifer unconscious by use of chloroform in order to have sexual intercourse with her, that Jennifer's face was scratched when she struggled with appellant as he placed chloroform over her mouth and nose, that she was raped and died within minutes from chloroform

intoxication. When appellant discovered Jennifer was not merely insensible but dead, he dressed her, putting her pants on inside out, disposed of the chloroform, allowed the chloroform smell to dissipate and then called the police.

The evidence was sufficient to find appellant killed Jennifer during the commission of a rape.

B. Miranda Warning

Appellant argues the trial court erred in admitting a tape recording of his October 23, 1991, interrogation because he was in custody and questioning was not preceded by a Miranda warning.

1. Facts

After an initial interview with police on August 16, 1991, appellant returned to his home in New Jersey. On the morning of October 23, 1991, Officers DeTar and Bruner of the Carlsbad Police Department and Sergeant Gannon of the Morris County prosecutor's office drove to the Parsippany, New Jersey, apartment complex where appellant lived. The officers were all in plain clothes and their car was unmarked. The officers believed appellant was a prime suspect in the murder of Jennifer.

As the officers drove up to the complex, they saw appellant walking toward a parking lot. DeTar got out of the car and contacted appellant. Appellant was asked if he would go with the officers to an office in town to talk. Appellant agreed to go but wanted to call the hospital. Officer DeTar suggested he call from the office. The officer told appellant he would bring appellant back after

the interview. On the ride to the office, appellant and the officers discussed the weather, the area in which appellant lived and the officers' flight from California and engaged in other discussions not related to the homicide. Appellant also asked the officers if they could help him get a refund on a additional charge made by his airline when he was required to extend his stay in California because of Jennifer's death. Appellant asked how long the interview would take. He was told between one and two hours and replied that would be fine. No force or suggestion of force was used in contacting appellant and no restraints were employed in transporting him.

The prosecutor's office was located in an office building. Appellant was not taken to a police station. At the office appellant asked and was allowed to make several telephone calls. He did so privately from a lieutenant's office. After being offered food and use of the facilities, appellant was interrogated by Officers DeTar and Bruner in an interview room.

The officers explained the door to the room was unlocked and appellant could leave at any time. Appellant was told he would be given a ride home. Appellant told the officers they could ask him anything they liked, he wanted to be of help. After a short discussion of appellant's background, the officers told him that if he had anything to do with Jennifer's death he should tell them about it. The clear tone of the officers' questions and comments was that they believed appellant was involved in causing Jennifer's death. The officers asked appellant, if it became necessary, would he take a polygraph test. Appellant stated he would and

it would show he had nothing to do with Jennifer's death.

The officers then told appellant they believed he was responsible for Jennifer's death but that her death was probably an accident. Appellant asked what evidence the officers had. The officers told appellant they knew what happened and it was time appellant told the truth. The officers told appellant Jennifer died from chloroform intoxication.

The interview then became a sparing session with the officers explaining how they believed appellant caused Jennifer's death and with appellant denying it. Appellant then recounted for the officers his version of what happened on the trip and the night Jennifer died.

At one point appellant requested the interview stop so he could call his family. Appellant was allowed to make his telephone call. After the call appellant stated he wished to make no additional statements. After the officers asked additional questions not directly related to Jennifer's death, appellant asked what would happen next. The officers told appellant they would take appellant home and continue working on the case. After several additional questions and comments concerning the case, the interview ended.

Following the interview, Officer DeTar drove appellant home. At no time was appellant told he was under arrest. Indeed, appellant was told on several occasions he was not under arrest, that he was free to go at any time and that he would be given transportation either to home or to work.

The trial court concluded that while appellant was a suspect, and while the interview was a pointed and accusatory interrogation, appellant was not in custody and, therefore, it was unnecessary the interrogation be preceded by a Miranda warning. The trial court, however, excluded all statements by appellant made after he expressed a reluctance to continue with the interview.

2. Law

Interrogation by the police of a person in custody must be preceded by a Miranda warning. (Stansbury v. California (1994) 511 U.S. ___ [128 L.Ed.2d 293, 298, 114 S.Ct. 1526].) Custody exists when there is a "formal arrest or the loss of freedom of movement to the same degree as a formal arrest." (TRW, Inc. v. Superior Court (1994) 25 Cal.App.4th 1834, 1849-1850; People v. Stansbury (1993) 4 Cal.4th 1017, 1050.) "In determining whether an individual was in custody, a court must examine all the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citations.]" (Stansbury v. California, supra, 511 ___ U.S. ___ [128 L.Ed.2d at 298].)

Whether an individual is in custody depends on the objective circumstances of the interrogation as perceived by a reasonable person under the circumstances. It does not depend upon the subjective view held by either the officers or the person interrogated. Therefore, the fact an individual is considered by the police to be a suspect has no direct bearing on whether the individual is in custody for the

purposes of Miranda. However, the communication of a suspicion by the officer may impact the custody equation insofar as it would affect a reasonable individual's assessment of his freedom of action. The communication of such a suspicion is not determinative of custody, however, since the declaration does not necessarily convey that the suspect has lost freedom of action. The matter is one that must be resolved on the totality of the facts in a given case. (Stansbury v. California, supra, 511 U.S. ___ [128 L.Ed.2d at pp. 299-300; see People v. Stansbury, supra, 9 Cal.4th at pp. 830-833; TRW, Inc. v. Superior Court, supra, 25 Cal.App.4th at pp. 1850-1851.)

The determination of whether an individual was in custody is a mixed question of law and fact. This court exercises its independent judgment on the legal issues, relying on any factual determinations made by the trial court as long as they are supported by substantial evidence. TRW, Inc. v. Superior Court, supra, 25 Cal.App.4th at p. 1851; but see People v. Stansbury, supra, 9 Cal.4th at pp. 830-831.)

3. Discussion

We conclude the trial court correctly found that appellant was not in custody during the October 23, 1991, interrogation. There is no doubt appellant was the prime, and clearly only, suspect in the death of Jennifer. Indeed, the Carlsbad Police Department was so interested in further questioning appellant, they sent two police officers across the country to talk with him. Appellant was interrogated, not in his home or the hospital, but at the county prosecutor's office. The tone of the interrogation early on was accusatory with the

officers making clear they believed appellant was responsible for Jennifer's death.

Nonetheless, the officers used no forceful measures in contacting appellant at his apartment complex, and they repeatedly made clear he was free to go at anytime. While the interrogation took place in an interview room at the prosecutor's office, such location is less indicative of custody than a police station or a jail where one would be expected to be taken if under arrest. While the officers' tone was accusatory, the totality of the circumstances would reasonably indicate appellant was a suspect but not that the officers were prepared to arrest him or even detain him against his will at that time. It appears appellant so understood the interview. (See In re Romero C. (1995) 33 Cal.App.4th 1838.)

Appellant relies heavily on two cases in support of his claim he was subjected to a custodial interrogation, People v. Celaya (1987) 191 Cal.App.3d 665 (Celaya), and People v. White (1968) 69 Cal.2d 751 (White). Celaya is immediately distinguishable. In that case the suspect was essentially told by the police unless he cooperated he was not free to leave the police station. (Celaya, supra, 191 Cal.App.3d at pp. 668-672.)

The facts of White are not so easily distinguished. In that case the police had reason to believe White might have information concerning a homicide. White was contacted at his home. Officers asked if he would come to the police station and was told statements were being taken from "everyone

concerned." After White arrived at the station, the officers became aware of additional evidence making him a prime suspect in the case. An officer confronted White with a coat found at the crime scene and which the officers had strong reason to believe belonged to White. The officer asked him if the coat was his. White stated it was not. The officer asked White if he would try on the coat. He did so and the coat fit. The officer stated the coat appeared to fit and that in any case White's name was in it. White then confessed. (White, supra, 69 Cal.2d at pp. 755-757, 759-760.)

Our Supreme Court found the confession was made during a custodial interrogation which had not been preceded by a Miranda warning and concluded the trial court erred in admitting it. (White, supra, 69 Cal.2d at pp. 760-761.)

We note, however, that White was decided only two years after Miranda and its discussion of the concept of custody is skeletal. The concept of custody for Miranda purposes has developed since the decision in White. A close reading indicates the court in White made the same error in its analysis of custody later made by the Oregon Supreme Court in Oregon v. Mathiason (1977) 429 U.S. 492.

In that case the police had reason to believe Mathiason was involved in a robbery. Mathiason voluntarily went to the police station and was interrogated in an interview room. The interrogating officer told Mathiason he believed he was involved in the crime and falsely told him his fingerprints had been found at the scene. Mathiason confessed. Only then

was he advised of his Miranda rights. (Oregon v. Mathiason, supra, 429 U.S. at p. 493.)

The Oregon Supreme Court concluded the confession was taken in violation of Miranda. The court cited the "coercive environment," specifically noting that the interview was conducted behind closed doors at the police station and that Mathiason was told he was a suspect in the crime and that the officer had evidence showing his guilt. (429 U.S. at p. 494.)

The United States Supreme Court rejected the analysis. The court noted Mathiason had come to the station voluntarily and was told he was not under arrest. The court stated: "Such a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of a formal arrest or restraint of freedom of movement, the questioning took place in a `coercive environment.'" (429 U.S. at p. 495.)

. The court noted any interview of an individual suspected of a crime is coercive but that the requirement for a Miranda warning is restricted to situations where coercion is the product of actual custody. (429 U.S. at p. 495.)

We conclude the "custody" analysis in White is the same as that of the Oregon Supreme Court in Mathiason and find it no longer authoritative.

The trial court properly admitted appellant's statements made during the October 23, 1991, hearing.

C. Use of Unedited Interrogation Tape Recordings

Appellant argues the trial court erred in admitting unedited versions of the tape recording and transcripts of the tape recording of the October 23, 1991, interrogation. Appellant notes the interrogating officers' comments and questions were replete with statements of disbelief, opinion concerning appellant's guilt, renditions of the police theory of Jennifer's death and references to evidence showing appellant's involvement in the crime. Appellant argues admission of the unedited interrogation tape allowed the introduction of inadmissible hearsay, prejudicial opinion and unimpeachable police "preaching" concerning appellant's part in Jennifer's death.

1. Background

During the testimony of the interrogating officers, the unedited tape of the October 23 interview was played and the jurors were provided transcripts of the recording. No objection was made before the playing began. At defense counsel's request, the tape was stopped and counsel argued at side bar that the portion of the tape then being played was a "self-serving speech" by the officers without reply by appellant. The trial court stated it would caution the jury the officers' statements were not offered for their truth but only as the basis for appellant's responses.

Without further protest from defense counsel, the trial court told the jurors "you should view these questions and answers in the same way that you view the question and answers in the courtroom. In other words, the questions are only pertinent as they may

explain what the answers themselves are. You are not to assume as true anything that Detective DeTar says in his questions. The questions are only pertinent as they give meaning to the answers."

Moments later, counsel again requested the tape be stopped. Counsel noted the tape was approaching a point at which the interrogating officers told appellant that Jennifer's friends and family members had related to them her statement she would not have sex with appellant and would not have sex until married. The court agreed to excise the comment. The court determined no juror had read ahead to the pages on which the statement appeared and had the pages removed from the transcripts. The court again admonished the jury the officers' statements were not admitted for their truth but were only to be considered as giving meaning and context to appellant's replies. The tape was then played without further objection.

2. Discussion

There is authority for the proposition that the tape recorded statements of an interrogating officers should be edited before the tape of the interrogation is played to the jury if necessary to eliminate excessive hearsay or other material not otherwise admissible or that would unfairly impact on the defense. (See People v. Sanders (1977) 75 Cal.App.3d 501, 507-508.)

As noted, in this case the defense objected to the playing of certain hearsay statements on the interrogation tape and the trial court, properly, excluded those statements. No general objection, however, was made to the tape on this basis and no request was

made the recording be otherwise edited. The issue is, therefore, waived. (See People v. Raley (1992) 2 Cal.4th 870, 892.)

Nor was trial counsel ineffective in failing to object. Counsel did object to the most serious and potentially damaging statements by the interrogating officers. We have waived the transcript of the remainder of the interview and find it generally unremarkable. There is no doubt the officers were accusatory and suggested in a variety of ways they did not believe appellant. The jury would certainly understand this to be the police position and would give to it no more weight than they would the fact appellant was charged by the prosecutor with murder or that the prosecutor clearly also disbelieved appellant.

The officers also suggested evidence existed Jennifer died from the inhalation of chloroform administered by appellant. The officers' comments, however, suggested no more than what the People proposed to prove at trial. There was nothing particularly damning in the officers' statements or suggestions of evidence or theories that the People did not present or offer at trial.

On the other hand it would have been very difficult to edit the tape recording by excising the complained of statements without seriously harming the coherence and meaning of the interview.

Trial counsel could reasonably believe the change the trial court would edit the tape was slim and that the harm done by the unedited tape recording was

small. On that basis counsel could properly decide not to make a broader objection than the one interposed.

In any event appellant could not have been harmed by the recording. The jury was instructed in the proper use of the tape and jurors are presumed to have followed such instructions. (People v. Mickle (1991) 54 Cal.3d 140, 197.)

D. Rebuttal Evidence Concerning Trustworthiness

Appellant argues the trial court erred in allowing the prosecutor to rebut defense testimony that appellant was trustworthy. Appellant contends the witness's statement that he was trustworthy was nonresponsive to the question asked, that the prosecutor's proper recourse was a motion to strike and that he could not simply use the nonresponsive answer as a basis for presenting rebuttal evidence concerning appellant's alleged lack of trustworthiness. Appellant argues the court's error in allowing such rebuttal was exacerbated by the limitations placed on the defense in attempting to impeach some of that rebuttal evidence.

1. Background

The defense opened with psychological experts claiming the existence of a rapist profile and opining that appellant did not fit that profile. The profile looked to a broad spectrum of personal factors and essentially disclosed that successful, well raised men of good character do not commit rape. The defense then offered a series of character witnesses to demonstrate appellant had traits of character incompatible with those of a rapist.

The first character witness was asked an extremely broad question: "I need your opinion of Sam Dubria and his feelings how he relates to other people." An objection was interposed, the trial court stated the question was too expansive and asked what specific traits counsel had in mind. Defense counsel stated all the criteria discussed by the psychologists dealing with the rapist profile. Counsel stated he would tighten up his questions. The court indicated it had no objection to the discussion of any characteristic of appellant inconsistent with the rape profile.

Counsel then asked the witness whether appellant was empathetic. The witness replied in detail, staring appellant was empathic, unselfish and went out of his way to help others. The witness was asked about appellant's commitment to medicine. The witness stated he was very committed to medicine and was a good and caring doctor.

The defense then presented eight additional character witnesses. While counsel often asked the witnesses reasonably limited questions, for example, about appellant's concern for others, the answers were often expansive. For example, it was stated appellant was never unkind, never said a bad word about anyone, was never chauvinistic, never treated women as sex objects, was always respectful to women and had excellence of character. Witnesses were asked about, and stated, they thought highly of appellant. One of these witnesses was a doctor who gained his opinion of appellant while supervising him in a hospital setting. At times the questions put by counsel were not limited but were very open ended. For example, a witness was

asked how appellant related to other people. The witness answered he as a gentlemen, courteous, sympathetic and a good friend.

The tenth character witness, Selve Agliam, was asked by defense counsel if she found appellant loving and compassionate. Agliam gave the following expansive answer: "He is loving, compassionate person, very caring, sensitive, trustworthy,. Very respectful person, very polite. Very gracious and very helpful." Neither defense counsel nor the prosecutor asked the nonresponsive elements of the answer be stricken.

Later, during appellant's testimony, the prosecutor stated to the trial court he planned to offer the testimony of Dr. Dumbauld as a rebuttal character witness. The doctor would testify that in his opinion appellant was not trustworthy and had a reputation for being untrustworthy. The prosecutor noted appellant had put on evidence of appellant's trustworthiness.

The court asked defense counsel if he agreed evidence of trustworthiness had been presented. Counsel stated he did not remember bringing up trustworthiness, that his questioning was directed toward the qualities of compassion and humanitarianism. The trial court stated it had written down the word trustworthiness in its notes. The prosecutor stated he could not have objected to the witness's answer concerning that character trait. Defense counsel stated he had no recollection of asking about trustworthiness.

Among other objections to rebuttal evidence concerning trustworthiness, defense counsel argued the witness was asked no question concerning trustworthiness and simply "blurted" the word out. Counsel stated the witness's answer had been nonresponsive and suggested the word be stricken.

After the prosecutor made an additional offer of proof concerning Dumbauld, and suggested a second rebuttal character witness, Dr. Epperly, would be presented on the issue of trustworthiness, the defense again argued such rebuttal should not be allowed. Counsel argued the People were treating the trait of trustworthiness as truthfulness while the context of the defense witness's answer indicated she was using the term to mean worthy of love and trust. The trial court found the defense had elicited evidence appellant was trustworthy. Having done so the People were entitled to rebut that evidence.

Immediately after the conclusion of the appellant's testimony, the People were allowed to present the rebuttal testimony of Dumbauld and Epperly. Dumbauld indicated he had supervised appellant in a resident program. The doctor was asked if he had an opinion concerning appellant's trustworthiness and replied: "I had a difficult time trusting [appellant] from a physician's standpoint." The doctor also stated appellant did not have a good reputation for trustworthiness.

Epperly testified he had also supervised appellant in a residence program. Epperly did not believe appellant was trustworthy. The doctor was

asked about appellant's reputation for trustworthiness and stated: "The reputation was that if he told you about something, you should check and make sure it was the way that he presented it to you."

Appellant responded to the testimony of Dumbauld and Epperly with additional character witnesses, including doctors with whom appellant had worked, indicating in the strongest terms that appellant was trustworthy.

After the testimony of these witnesses, the prosecutor offered the rebuttal testimony of a third physician, Dr. Pilger. Pilger supervised appellant in the resident program at Good Samaritan Hospital. It was Pilger's opinion that appellant was not trustworthy.

2. Discussion

Appellant cites numerous cases for the proposition a party may not fail to objection to immaterial or irrelevant evidence and then use such admission as a basis for preventing rebutting or impeaching evidence in response. (See, e.g., People v. Williams (1989) 213 Cal.App.3d 1186, 1190; People v. Gambos (1970) 5 Cal.App.3d 187, 192; People v. Johnson (1964) 229 Cal.App.2d 162, 169-170.)

We find no error. It was clearly appellant's plan to present a wide spectrum of favorable character traits. Such evidence was not only generally admissible but specifically admissible to support the conclusion of defense psychological experts that appellant's trait of character did not fit the rapist profile. In doing so defense counsel showed no particular interest in limiting

himself to narrowly drawn questions directed at specific character traits. Nor did defense counsel witnesses show any inclination to limit their answers to the questions asked. All of this was perfectly natural since the defense clearly wished to demonstrate appellant was of exemplary character in every respect.

That being the case there was no reason for the prosecutor or defense counsel to interpose a motion to strike when a witness gave an expansive answer to a relatively narrow question concerning appellant's character. All the traits of character mentioned by the witnesses were admissible and no practical purpose would be served by objecting, given the spectrum of character evidence being presented. In the context of the evidentiary approach of the defense, we believe the trial court properly allowed the prosecutor to present evidence rebutting the claim appellant was trustworthy.

In any event we think the evidence is of little moment. The defense was successful in presenting evidence appellant was highly thought of by friends and colleagues both in personal and professional settings and that he was considered trustworthy. The testimony concerning lack of trustworthiness given by Dumbauld, Epperly and Pilger involved a very short view of appellant in a particular setting. We do not believe it probable excluding this rebuttal testimony would have resulted in a verdict more favorable to appellant. (See People v. Watson (1956) 46 Cal.2d 818, 836.)

Appellant argues any error in admitting the rebuttal testimony was compounded by the trial court's exclusion of evidence impeaching Dumbauld concerning

the basis of his opinion. Appellant contends the trial court improperly restricted cross-examination concerning the contents of an unfavorable report concerning appellant made to Dumbauld by Pilger. It was the defense position Dumbauld's opinion of appellant's trustworthiness was based on the unfavorable report made by Pilger.

During the defense cross-examination of Dumbauld, counsel offered a set of evaluation forms done on appellant submitted to Dumbauld by other supervisors. Dumbauld noted that on one of the forms from Pilger, there was a note concerning appellant's trustworthiness. An objection was made to testimony concerning the report. Counsel responded the report was crucial since it was the sole basis for Dumbauld's opinion concerning appellant's trustworthiness. Counsel was allowed to question Dumbauld generally about the report but was not allowed to ask about the specifics of the report. The doctor stated the report did not play any significant part in his evaluation of appellant's trustworthiness. Counsel was allowed to show that appellant's evaluations were generally satisfactory and some were superior and that Dumbauld had responded to inquires from another hospital that appellant was competent to continue his residency and made no comment concerning a lack of trustworthiness. There was no particular relevance in probing the evaluation by Pilger and the trial court could properly restrict questioning concerning it.

E. Evidentiary Rulings

1. Jennifer's Use of Birth Control

Appellant notes the following evidentiary

progression: During his testimony appellant stated that before having intercourse with Jennifer, he asked her if she was on any type of birth control and she stated she was on the pill. In rebuttal the People offered the testimony of Jennifer's gynecologist, Dr. Chung, that he prescribed birth control pills for Jennifer to treat menstrual spotting and that use of the pills was to begin on August 18, two days after Jennifer's death. The doctor testified this was the first time he prescribed birth control pills for her. The doctor was asked if Jennifer requested the pills, and he answered no, the pills were a common treatment for Jennifer's complaint and prescribing them was his idea.

In response, appellant sought to offer testimony from Chung that in December 1989 Jennifer told him she was sexually active and using "rubber and rhythm methods" of birth control. Defense counsel argued the evidence was admissible since it tended to corroborate appellant's testimony. Counsel argued the important evidence was that Jennifer was knowledgeable about birth control methods and this was relevant to her willingness to consent to sexual intercourse with appellant.

The prosecutor objected, saying it was improper to go into the sexual history of a rape victim and further argued that the only issue was the impeachment of appellant's testimony. Specifically, the only issue was Jennifer's alleged statement she was on the pill when Chung's testimony indicated she was not.

The trial court noted that as a general matter, evidence of a victim's prior sexual conduct was

inadmissible pursuant to Evidence Code[1] section 1103. The court noted it was the appellant's testimony that raised the issue Jennifer's use of birth control pills. The People responded narrowly, offering evidence that while Jennifer had been given birth control pills by Dr. Chung, she was not scheduled to start taking them until days after her death. (As noted evidence was offered she had not started taking the pills.)

The court concluded the People's use of such evidence did not reasonably open a defense inquiry into Jennifer's prior sexual conduct. Citing section 352, the trial court concluded allowing an inquiry into Jennifer's prior use of other birth control methods would be so time consuming, would have such a danger for confusion and had such a potential for prejudice that it should be excluded. In so doing, the court noted that from prior discussion between the parties and the court, the court was aware the prosecution had evidence that Jennifer had engaged in sexual intercourse with a previous boyfriend, had been traumatized by the experience and had indicated she would have no further such encounters. The court concluded it was best to confine evidence concerning Jennifer's sexual history to that already presented.

We find no abuse of discretion in the trial court's decision to exclude testimony concerning Jennifer's use of birth control methods in 1989. The evidence concerning Jennifer's use of birth control pills at the time

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[1] All statutory references are to the Evidence Code unless otherwise specified.

of her death was narrow. Appellant testified he asked Jennifer if she was on any type of birth control. He testified she replied she was on the pill. The People responded with evidence she was not on the pill at the time of her death. This point and counterpoint effectively closed the issue of her use of the pill at the time of her death.

Appellant, however, proposed to expand the matter by eliciting evidence concerning Jennifer's use of other forms of birth control at an earlier time and while involved in another relationship. The purpose of this evidence was to directly show her knowledge of other forms of birth control in an effort, apparently, to indirectly suggest she was using such other forms the night of her death and, thus, would not be adverse to having intercourse with appellant.

There was no evidence that on the night of her death Jennifer was using any form of birth control. The link between use of other methods at another time under different circumstances and use of such methods the night of her death was tenuous and had the danger that the jury would receive the evidence as a comment on Jennifer's sexual habits and mores. (See § 1103, subd. (c).) The evidence had limited relevance, would have opened up a wider and time consuming exploration of Jennifer's sexual history and was properly excluded by the trial court pursuant to section 352.

2. Jennifer's State of Mind

Appellant argues the trial court erred in admitting hearsay statements made by Jennifer to friends and family members concerning her feelings about her

boyfriend Chris Eckes, about appellant and about her intention not to engage in sexual relationship with appellant. The evidence was offered pursuant to the state of mind exception to the hearsay rule (§ 1250) to support the prosecution's argument Jennifer had not engaged in consensual sexual intercourse with appellant the night of her death.

Appellant notes a hearsay statement declaring a state of mind is inadmissible if the statement was made under circumstances indicating its lack of trustworthiness. (§ 1252.) The comment to section 1252 explains: "If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence."

Appellant observes Jennifer's statements she had no intention of engaging in sexual activity with appellant were made weeks before the trip, or to male friends or at the instigation of family members. Appellant contends it is unlikely Jennifer would have indicated to others any intention to engage in a physical relationship with appellant. Appellant argues Jennifer's statements are less than trustworthy since Jennifer agreed to go on the trip, agreed to stay with appellant in a tent and eventually agreed to stay with him in a motel room.

"'The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human being actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of

discretion. [Citation.] A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion. [Citation.]" (People v. Edwards (1991) 54 Cal.3d 787, 819-820.)

There was no abuse of discretion in admitting Jennifer's statements. For a trial court to conclude a statement is sufficiently trustworthy to allow its admission under the state of mind exception does not require it find the statement unassailable or its implications totally without ambiguity. The question of trustworthiness is not an absolute but a matter of degree.

In this case it is possible Jennifer's statements that she did not intend to have a physical relationship with appellant could have been made for the consumption of friends and family. It is also possible that even if the statement were accurate reflections of her state of mind when made, she later changed her mind and consented to sexual intercourse. However, we concluded there were matters for argument to the jury and did not demonstrate such a lack of trustworthiness in the statements that the trial court was required to exclude them.

F. Instruction on Lesser Included Offenses

Appellant notes that over defense objection the trial court instructed on lesser included offenses that were inconsistent with his defense. Noting the issue is presently before the California Supreme Court, appellant argues it is error to instruct over defense objection on lesser included offenses that are inconsistent with the defense theory of the case.

(People v. Barton (Cal.App. D014513) review granted Mar. 15, 1993, S031258.) In Barton this court held to the contrary. We adhere to that decision.

Appellant further argues, assuming a duty to instruct on lesser included offenses, the trial court erred in refusing to instruct on all lesser included offenses of rape. Appellant contends this was of crucial importance since the murder charge and the allegation of special circumstances was dependent on a finding of rape or attempted rape.

Appellant notes after the trial court indicated its intent to instruct, over defense objection, on lesser included offenses counsel requested the court instruct on the offenses of attempted rape, sexual battery and assault. The court inquired what evidence supported an instruction on assault with the intent to commit rape. Counsel replied it was possible there were two sexual events, one consensual and the other nonconsensual and assaultive. The trial court stated such claim was based on speculation and declined to instruct on the offense. The trial court stated no instruction was required on any misdemeanor lesser included offenses since those offenses were time barred. The trial court did instruct on the lesser included offense of attempted rape, concluding a dispute existed concerning whether the act of intercourse was consummated.

On appeal appellant argues the trial court also was required to instruct on the lesser included offense of sexual battery.

1. Law

A trial court is required to instruct on the general principles of law closely and openly connected with the facts of the case. This obligation includes "giving instruction on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present." (People v. Sedeno (1974) 10 Cal.3d 703, 715.)

No instruction, however, on a lesser included offense is required unless there is substantial evidence that would support the finding of that offense. There must be "'evidence sufficient to deserve consideration by the jury, i.e., evidence from which a jury composed of reasonable men could have concluded that the particular facts underlying the instruction did exist. [Citation.]'" (People v. Strozier (1993) 20 Cal.App.4th 55, 63.) There must be evidence that would allow the trier of fact to reasonably conclude the defendant was guilty of the lesser offense.

The trial court is not required to instruct on lesser included offenses if the evidence was such that the defendant, if guilty at all, was guilty of the greater offense. (People v. Kelly (1990) 51 Cal.3d 931, 959.)

2. Discussion

In large part appellant's argument is based on the premise that the evidence supporting the theory of rape was so vague and insubstantial, it would support instruction on lesser sexual or assaultive offenses.

First, sexual battery is not a lesser included offense of rape and thus there was no error in failing to

give and instruction on it. (In Re Alberto S. (1991) 226 Cal.App.3d 1459, 1463-1464.)

Next, assault with intent to commit rape is merely an aggravated form of attempted rape and instruction on that offense would not have assisted appellant. (People v. Ghent (1987) 43 Cal.3d 739, 757.)

Finally, we do not believe the evidence supports the giving of any form of an assault or battery instruction as a lesser offense of those charged. The People's theory of the case, and the evidence offered, supports the conclusion appellant administered chloroform to Jennifer to allow the accomplishment of sexual intercourse against her will. Appellant's defense was that he had done nothing to harm Jennifer, the two engaged in consensual intercourse and he had no idea how chloroform ended up in Jennifer's body fluids.

There was no evidence supporting a reasonable inference appellant committed a lesser assaultive offense. If appellant did not administer chloroform to Jennifer against her will, then he was not guilty of any assaultive offense. If he did administer chloroform to Jennifer against her will, there no was basis to believe he did so for any reason except to commit rape. Thus, there was no basis for the giving instructions on lesser assaultive offenses.

G. Prosecutorial Misconduct

Appellant argues the prosecutor committed misconduct during argument to the jury. He argues the prosecutor unfairly referred to punishment, directed epithets at appellant, suggested the importance of

matters not in evidence and stated defense counsel knew appellant was guilty.

Appellant first complains about these comments by the prosecutor: "First of all, the defense is basically asking you to let him go based on the defendant's testimony. To let him walk out the door based on that testimony." Appellant contends the words are an improper appeal to prejudice and a comment on punishment.

No objection was made to the comments and the issue is waived. (People v. Visciotti (1992) 2 Cal.4th 1, 79.) In any event the statements are innocuous, simply meaning the defense wanted the jury to find appellant not guilty based on his testimony.

Appellant also complains about the following comments by the prosecutor: "It's one thing for him to out on the street tell a lie or even to sit in this courtroom and make the People prove the case against him. But to get up here and get on the stand and look at you people and tell you that story that he told you in front of the family, this piece of garbage, making up every little bit of it, he's the biggest liar you've ever encountered. He's a lot worse than that. I'm not going to tell you. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else."

No objection to any of these comments was interposed and any issues involving the prosecutor's comments is, therefore, waived. We do not find, as appellant argues, any ineffectiveness in the failure to

object. We simply do not find in the comments the gross unfairness appellant perceives. Of course, the prosecutor believed appellant was a liar and his lies were serious ones. The prosecutor did not call appellant "garbage," as is now suggested on appeal, he called his story garbage. Reference to lying in front of the victim's family were, perhaps, uncalled for, but we do not believe it could have had any meaningful effect on the jury.

We are unclear exactly what the prosecutor meant when he told the jury appellant was a lot worse than a liar, that the jury could imagine some of the things appellant was but that the prosecutor would not mention them since the jurors knew in their hearts what else appellant was. Presumably the prosecutor meant appellant was a rapist and murderer. The comment is so obscure we do not believe it could have diverted the jury from its task of considering the evidence.

Finally, appellant notes in closing that the prosecutor made reference to the defense argument the evidence allowed for a verdict of involuntary manslaughter based on reciprocal chloroform use. The prosecutor stated there was no evidence supporting such a claim, that in his testimony appellant had never suggested such conduct. The prosecutor then stated: "The reason he [defense counsel] talked about involuntary manslaughter is because he knows that you know that the defendant is guilty. You are not going to want to let him go, but maybe they will compromise on the lowest offense in here, so -- because they are certainly not going to let him go, get away with this."

No objection was made to the prosecutor's comments. It is, of course, improper for the prosecutor to suggest counsel believes his client is guilty. The prosecutor's comments here came close to such a statement. The real import of the prosecutor's comments, however, was that counsel was offering a defense for which there was no evidentiary support. The defense was offered because the jury would find appellant responsible for Jennifer's death but might compromise its verdict to a lesser offense. There was no direct statement by the prosecutor suggesting defense counsel knew or even believed appellant was guilty. We do not believe the prosecutor's comments required the defense object.

H. Ineffective Assistance of Counsel

Appellant cites four instances of alleged ineffective assistance of counsel. Two of the cited instances, failing to object to the playing of a tape recording of appellant's October 21, 1991, interview, and failing to object to portions of the prosecutor's argument to the jury, are addressed in other portion of this opinion. Two additional claims of ineffective assistance remain. Appellant argues counsel was ineffective in failing to object to what he refers to as the prosecutor's "guilt-assuming hypothetical," and was ineffective in failing to object to the claimed conclusionary testimony of Officers Preston.

"To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient

representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to petitioner. [Citations.] `A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (In re Neely (1993) 6 Cal.4th 901, 908-909.)

Given the complexities of legal representation and the inherent difficulty of judging professional conduct after the fact, we indulge a strong presumption counsel's conduct falls within the broad range of reasonable representation. (Strickland v. Washington (1984) 466 U.S. 668, 689-690, 694.)

1. Guilt-Assuming Hypothetical

Appellant notes on cross-examination that defense character witnesses were asked questions essentially concerning whether their good opinion of appellant could be changed by learning of fact which tend to show he had killed Jennifer. For example, one witness was asked: "Regardless of what the evidence might show in this case, you are going to keep the same opinion of Dr. Dubria's character, correct?" The witness answered, yes.

Another character witness was asked by the prosecutor if he had sat through all the evidence or had the opportunity to talk to the investigating officers about the crime. He stated he had not and agreed his opinion of appellant might be changed by that evidence.

Other character witnesses were asked similar questions and gave similar answers. One witness

stated unless appellant admitted the crimes she should not believe he committed them.

Appellant argues the form of these questions was improper and counsel was ineffective for failing to object to them.

Citing federal authority, appellant argues it is improper to impeach defense character witnesses with guilt-assuming hypotheticals, e.g., "Would your opinion of the defendant change if you knew he committed the charged offense?" (See U.S. v. Oshatz (2nd Cir. 1990) 912 F.2d 534, 537-539; U.S. v. Siers (4th Cir. 1989) 873 F.2d 747, 749.)

In this state the rule seems to be that such evidence is admissible. (People v. Qui Mei Lee (1975) 48 Cal.App.3d 516, 523-528.)

Respondent not only cites Qui Mei Lee for the proposition such cross-examination is proper, but also contends the prosecutor was not asking guilt-assuming hypotheticals. Respondent is correct, the specific questions asked on cross-examination did not require the witness assume guilt. The clear import of those questions was that evidence, about which the witness was asked, established guilt.

It is unnecessary we resolve the ultimate issue of the propriety of such cross-examination. We do not believe such questions could have significant impact on the jury's view if the witnesses nor could it have affected in any way the jury's evaluation of the evidence in the case. Any failure of defense counsel to object to the

prosecutor's questions was harmless.

2. Objection to Lay Opinion Testimony

Appellant argues defense counsel was ineffective in failing to object to testimony from Officers Preston that on the morning of Jennifer's death appellant appeared to be "acting" and "trying to make himself cry," based on appellant's "body Language," "facial expressions," and the way appellant "seemed to be pleading" with the officers to believe his story.

A lay witness may offer an opinion if based on the witness's own perceptions and if helpful to an understanding of his testimony (§ 800.) A lay witness may not give an opinion concerning the veracity of a declarant. (People v. Melton (1988) 44 Cal.3d 713, 743-744.) Officers Preston's opinion testimony was that essentially appellant was not sincere in his expression of concern for Jennifer and was merely attempting to appear concerned for the officers' benefit. We do not believe the evidence admissible and was the proper subject for an objection.

We do not know why counsel failed to object to the officers' conclusions. There seems no readily apparent tactical basis for not objecting. We do not find, however, appellant was harmed by the failure to object. The officers' comments were a very small part of a very complex case. We think a jury would be far more interested in the consistencies and inconsistencies in appellant's testimony and the events before and after the crime than in the perceptions of one officers about the behavior of appellant during an emotionally complex event.

I. Instruction On Presumption of Innocence

Appellant argues CALJIC No. 2.90 defining reasonable doubt is defective and denied appellant due process of law. The instruction was properly given. (Victor v. Nebraska (1994) ___ U.S. __ [114 S.Ct. 1239].)

J. Felony Murder Special Circumstance

Appellant argues the special circumstance of murder during the commission of rape (Pen. Code, § 190.2, subd. (a),(17), (iv)) is unconstitutional as failing to meaningfully narrow the class of crimes to which the death penalty or the penalty of life without the possibility of parole can be applied. (See Zant v. Stephens (1983) 462 U.S. 862, 877.) Our Supreme Court has rejected the contention. (People v. Marshall (1990) 50 Cal.3d 907, 946; People v. Anderson (1987) 43 Cal.3d 1104, 1147.)

K. Cruel or Unusual Punishment

Citing People v. Dillon (1983) 34 Cal.3d 441, 477-488, appellant argues we should reduce his term of life without possibility of parole to life with the possibility of parole since the term as imposed in this case amounts to cruel or unusual punishment. We decline.

L. Double Conviction

Appellant contends conviction of rape through the use of an intoxicating substance (Pen. Code, § 261(3)) prohibits an additional conviction of administering

chloroform to commit a felony. (Pen. Code, § 222.[2])

The California Supreme Court has long held that multiple convictions may not be based on necessarily included offenses. (People v. Pearson (1986) 42 Cal.3d 351, 355.) "'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.'" (Ibid., quoting People v. Greer (1947) 30 Cal.2d 589, 596.)

The general intent crime of rape can be committed in many different ways. The various means of committing rape listed in Penal Code section 261 do not create multiple offenses. This conclusion finds support in section 263 which provides in part: "The essential guilt of rape consists in the outrage to the person and the feelings of the victim of the rape." (People v. Collins (1960) 54 Cal.2d 57, 59.)

Because rape can occur without the use of an

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[2] Penal Code section 222 states: "Every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating agent, with the intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony."

At the time of the trial Penal Code section 261(3) stated: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: . . . [¶] (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of the accused." (Stats. 1984, ch. 1635, § 79.5.)

intoxicating substance, it is possible to commit rape without also committing the crime of administering chloroform for the purpose of committing a felony. Appellant, therefore, could properly be convicted of both Penal Code sections 261, subdivision (3), and 222. (Pen. Code, § 954; People v. Pearson, supra, 42 Cal.3d at pp. 354-358.)

II

Petition for Writ of Habeas Corpus

Petitioner Samson Dubria seeks a writ of habeas corpus, alleging the presentation by the People of false evidence offered to support the claim of death by chloroform intoxication or, in the alternative, the discovery of new evidence concerning such cause of death. Petitioner further alleges ineffective assistance of counsel, repeating contentions made on appeal but presenting a declaration of trial counsel indicating no tactical basis for the alleged professional omissions.

A. Law

Relief by habeas corpus is available "when `[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration.' [Citation.] There is no requirement that the prosecution have known that the evidence was false. [Citations.] People v. Pensinger, (1991) 52 Cal.3d 1210, 1274.)

Newly discovered evidence warrants habeas corpus relief when it "undermine[s] the entire structure of the case upon which the prosecution was based; it must point unerringly to the petitioner's innocence and must be conclusive; it is not sufficient that the new evidence conflicts with that presented at the trial and would have presented a more difficult question for the trier of fact. [Citations.]" (In re Wright (1978) 78 Cal.App.3d 788, 802; see also In re Clark (1993) 5 Cal.4th 750, 766.)

B. Petition and Response

Petitioner's claim of false evidence and his alternative claim of newly discovered evidence are based on the declarations of two experts, pathologist Dr. Robert Bucklin and chemist Dr. Robert Sanchez.

1. Dr. Bucklin

Bucklin makes a series of complaints concerning the thoroughness of the autopsy and the forensic investigation conducted by the prosecution's pathologist, Dr. Leena Jariwala, as well as her objectivity and analytical approach. Specifically, Bucklin takes issue with Jariwala's conclusion the injuries to the victim's face could not have been inflicted post-mortem by the efforts of medical personnel to revive her. Bucklin, citing medical literature and experience, states normal physical processes and the use of CPR could have made post-mortem superficial injuries to Jennifer's face appear to have been caused before death. The doctor, again citing literature on the subject, also contradicts trial testimony suggesting the facial injuries could not have been caused by efforts to revive her.

Bucklin next criticizes Jariwala for failing to consider the possibility of chloroform inhalation or ingestion by means other than force. Bucklin notes literature indicating the use of chloroform as a recreational drug and its presence in the general environment. Concluding the levels of chloroform "quite low for a cause of death" in Jennifer's case, Bucklin concludes Jariwala too dogmatic and conclusory in finding the cause of death to be chloroform inhalation. In this regard Bucklin states brain tissue samples should have been taken to determine the concentration of

chloroform in that organ.

Next, Bucklin questions Jariwala's rejection of the possibility Jennifer's death was caused by gastric content aspiration. While Bucklin agrees aspiration can be an event occurring with death and not the cause of death, he states determining the timing of aspiration is difficult. He also states in this case an endothracheal tube was placed in Jennifer by the paramedics and remain in place until the autopsy. Such tube diminishes the possibility of post-mortem aspiration.

Bucklin also criticizes Jariwala's failure to follow proper examination standards. He states lung tissue should have been taken and a sample of cerebrospinal fluid collected. A thorough investigation of the victim's mouth should have been made for signs of trauma related to forced inhalation of chloroform. Evidence should have been collected at the motel room and scrapings should have been taken from under Jennifer's fingernails.

Bucklin also criticizes Jariwala for not dissecting for examination the SA and AV nodes from Jennifer's heart. He states such dissection is necessary for a proper investigation for the sudden death of a young adult. In particular, he states that without study of these nodes, Jariwala could not justifiably have testified there were no changes in the conduction system of Jennifer's heart. He states the autopsy report is not complete enough to determine whether a proper heart conduction investigation was undertaken.

Bucklin concludes by listing several disorders

that could have caused Jennifer's death and were not eliminated by the autopsy and the examination performed in this case. He states he is not convinced the cause of Jennifer's death was chloroform poisoning and states: "This is a highly atypical presentation for a drug inhalation fatality."

2. Dr. Sanchez

Chemist Sanchez notes in his declaration that the tissue samples in this case from which chloroform findings were made were stored in plastic containers and refrigerated. While he did not know the type of plastic container used, he was surprised such vessels were employed since chloroform and other low molecular weight solvents and gases have significant permeability through "many common plastics." He states: "If the composition of the plastic container is such that it is permeable to chloroform," substance may be lost or the sample may be contaminated by an outside source of chloroform. Sanchez lists sources for such contamination.

Sanchez states he reviewed the records of the medical examiner's office related to the identification and quantification of the chloroform in the various samples. Sanchez believes the data and analytical details appear incomplete. After reviewing the data, Sanchez states he is unable to resolve what appear to be inconsistent results which "[appear] to pose a challenge to the meaning and reliability of the [analysis done]." Sanchez speculates contamination may have occurred.

Sanchez then reviews the scientific reliability of

the studies relied on by the prosecutor's experts and finds them useless for making pharmacological conclusions.

3. Additional Briefing

The response of the Attorney General relied solely on legal arguments and did not directly confront Bucklin's and Sanchez's declarations. The Attorney General argued no demonstration was made that false evidence was offered at trial and petitioner had done nothing other than to show a not so rare difference in expert opinion concerning issues already addressed to one degree on another at trial.

We requested the Attorney General respond to two questions concerning the declaration of Sanchez. The People were asked to respond to Sanchez's concerns regarding the use of plastic vessels to hold samples and his review of the testing which suggested to him incomplete data, anomalous results and the possibility of contamination.

The People responded first with a review of the testimony at trial concerning the testing which detected chloroform in Jennifer's body fluids. Two witnesses testified concerning the testing. Frank Shaw, chief toxicologist for the medical examiner's office, testified chloroform was kept in the toxicologist lab and was used as a solvent. The substance, however, is not left about but is stored and used in a hooded, vented area. Shaw also stated there were strict guidelines in place to insure the accuracy of testing but did not elaborate. Shaw also testified that a blood sample was sent to a lab in Los Angeles and it confirmed the presence of

chloroform in that fluid.

On cross-examination by defense counsel, extensive questioning was done concerning the use of chloroform in the tests done. The only use of chloroform was in the gas chromatograph to establish a standard for the test. Shaw stated there had been occasions when samples had become contaminated at the lab. On redirect Shaw stated it was his opinion the samples in this case were not contaminated.

William Wilcox, a staff toxicologist with the medical examiner's office, performed the actual tissue testing. Wilcox explained how the tests were done with particular emphasis on the factors which would negate any claim of contamination. Wilcox stated chloroform is seldom used in the lab and he could not recall any occasion in which he had contaminated a sample with chloroform. Wilcox believed such contamination highly unlikely and felt it had not occurred in this case given the discovery of chloroform in several tissues. Wilcox noted the defense had been given tissue samples for their own testing. Defense counsel's cross-examination of Wilcox was brief and did not bring his testimony into question.

In direct response to our questions, the People offered the declaration of toxicologist Dwight Reed. Currently, Reed is employed by the medical examiner's office; at the time of the testing in this case he was not. Reed appears to agree that plastic containers are not the material of choice for storing samples which will be tested for the presence of volatile substances. (It appears plastic vessels are generally used and at the

time the samples were taken, there was no reason to believe testing would be done for volatile materials.) Reed's discussion of the test performed, like Sanchez's review, is a technical one. Reed generally concludes Sanchez does not understand conventions employed by users of the particular mass spectrograph used in this case and questions each of Sanchez's pertinent conclusions. Reed finally notes he has reviewed the toxicological report for this case in light of Sanchez's claims and concludes the tissue samples did contain chloroform and the presence of that substance was not the result of contamination.

Petitioner filed a reply to the People's response. Petitioner concludes a factual issue exists concerning whether blood samples were kept in plastic containers and whether storage of all the samples in such containers might have allowed for contamination. Petitioner's reply contains a highly technical declaration from Sanchez in which he again concludes the test results are anomalous and perhaps show contamination.

4. Discussion

Petitioner's claim if the use of false evidence and the discovery of new evidence are both wanting and do not state a prima facie case for relief. People v. Duvall, (1995) 9 Cal.4th 464, 474-475.) What petitioner offers is neither a revelation of false evidence or the discovery of new evidence; what petitioner offers, rather, is a not-so-rare conflict in the opinion of experts. The issues of the completeness of the medical examination and the medical conclusions that resulted, as well as the possibility of sample contamination, were raised below. It may be petitioner now presents better evidence on the

issues than he offered at trial. While this might suggest ineffective assistance of counsel, an argument not advanced by petitioner, it does not amount to a showing or the presentation of "false" evidence and certainly does not satisfy the requirement with regard to "newly discovered evidence" that it be conclusive and point unerringly to innocence. It is not enough the cited evidence simply conflicts with that offered at trial or would have made the task of the trier of fact more difficult.

The judgment is affirmed; the petition for writ of habeas corpus is denied.

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BENKE, J.

WE CONCUR:

_____

KREMER, P.J.

_____

WORK, J.

Fourth Appellate District, Division One,
No. D018852/D021337 SO48385

IN THE SUPREME COURT OF CALIFORNIA

In Re Samson Dubria On Habeas Corpus
THE PEOPLE, Respondent

v.

SAMSON DUBRIA, Appellant

SUPREME COURT
FILED
OCT 19 1995
Robert Wandruff Clerk
___H. CRUZ___
Deputy

Appellant's petition for review DENIED.

LUCAS

Chief Justice

EXHIBIT B

RULE 14(H) STATEMENT OF FEDERAL QUESTION PRESERVATION IN STATE COURT

1. The Miranda v. Arizona (1966) 384 U.S. 436] **"Custody" question.** A motion was brought pre-trial urging that petitioner was in custody under **Miranda** and that all statements should have been suppressed. Clerk's Transcript, 25-50. After considering the arguments and opposing motions, the trial court rejected the argument and admitted the tape of the interrogation. It found no custody: "it appears as if a reasonable person would not have felt as if he were under arrest given the fact he was told that, given the way he was treated, and all the other factors." RT 65. Thereafter, the statements were admitted into evidence. On appeal to the state court of appeal, the appellate court agreed with the trial court's determination of no custody for purposes of the **Miranda** test. See Exhibit A, 28, noting the trial court handling of the **Miranda** custody issue. Relying on this court's precedents in the areas, the court of appeal affirmed the trial court. Exhibit A, 31-32. Petitioner then took the same claim to the California Supreme Court which denied review on the merits of the federal constitution claim on October 19, 1995.

2. The Lesser Included Offense Instruction. At trial, petitioner's counsel stated his position on lesser included instructions: If the trial court was to give any lesser included instructions (which it stated it was compelled to do), it should give them all. RT 2086, 2087. "Mr. Bernstein [petitioner's counsel]: Both ways, all or nothing. In other words, only the charges filed or nothing, or if we're going to give lesser but includeds

EXHIBIT C

over our objections, then give all the lesser but includeds." RT 2090. The court declined to give the requested LIO instructions on rape. RT 2089. On appeal, the Court of Appeal affirmed the trial court's denial of LIO instructions. Exhibit A, 50. (California decisions hold that the right to instructions on lesser included offenses is an incident of due process of state law.[3]) This claim was also asserted in petitioner's petition for review to the state high court which noted the diversity of federal court opinions on the federal due process claim. Petition for Review, p. 19. The California Supreme Court denied review of the petition. Exhibit B.

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[3] "[A] procedure which affords the trier of fact no option other than conviction or acquittal when the evidence shows that the defendant is guilty of some crime but not necessarily the one charged, increases the risk that the defendant may be convicted notwithstanding the obligation to acquit if guilt is not proven beyond a reasonable doubt. The pressures which create that risk thus affect the reliability of the fact finding process and thereby undermine the reasonable doubt standard." People v. Geiger, 35 Cal.3d. 510, 520, 199 Cal.Rptr. 45, 674 P.2d 1303 (1984).)